TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 191.

THE CUMBERLAND GLASS MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES DE WITT, TRADING AS CHARLES DE WITT AND COMPANY.

IN ERROR TO THE COURT OF APPEALS FOR THE STATE OF MARYLAND.

FILED JUNE 9, 1915.

(28,743)

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INDEX.

	Original.	Print
Caption	1	1
Transcript from superior court of Baltimore city	2	1
Declaration	3	1
Docket entry; plea	5	3
Petition for leave to file additional plea	6	3
Order granting leave to file additional plea	6	4
Additional plea	6	4
Demurrer to plea	9	6
Order sustaining demurrer	9	6
Amended narr	9	6
Pleas to amended declaration	11	7
Replication and demurrer	14	9
Order overruling pleas in part and sustaining in part and granting leave to amend	14	9
Replication to second plea	14	9
Demurrer to replication to second plea	15	10
Order sustaining demurrer to replication to second plea	15	10
Amended replication to second plea	15	10
Demurrer to amended replication to second plea	16	11

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	Original.	Print
Order overruling demurrer to amended replication to second plea	16	11
Rejoinder to amended replication to second plea	17	11
Docket entry	18	12
Jury sworn	18	12
Verdict entered	18	12
Motion for new trial filed	18	12
Petition and order extending time for filing bill of exceptions	18	12
Docket entry	18	12
Motion for new trial overruled	18	12
Judgment on verdict entered	18	12
Order for appeal, &c	19	12
Petitions and further orders extending time for filing bill of exceptions	19	13
Bill of exceptions	21	14
Objections to testimony	21	14
Rule 25, superior court of Baltimore city	22	14
Defendant's second bill of exceptions	23	15
Testimony of Charles De Witt	24	16
Plaintiff's Exhibit No. 1—Letter of Charles De Witt & Co. to Mallard Distilling Co., February 8, 1906	26	17
Defendant's third bill of exceptions	27	17
Testimony of Charles De Witt (continued)	27	17
Lewis W. Lake	28	18
Defendant's fourth bill of exceptions	29	19
Testimony of Lewis W. Lake (continued)	29	19
Plaintiff's Exhibit No. 1—Letter of Charles De Witt & Co. to Mallard Distilling Co., February 8, 1906	30	20
Defendant's fifth bill of exceptions	31	20
Testimony of Lewis W. Lake (continued)	31	20
Defendant's sixth bill of exceptions	33	22
Testimony of Charles De Witt (continued)	33	22
Defendant's seventh bill of exceptions	36	24
Testimony of Charles De Witt (continued)	36	24
Defendant's eighth bill of exceptions	37	25
Motion to strike out testimony	37	25
Defendant's ninth bill of exceptions	37	25
Testimony of Charles De Witt (continued)	37	25
Defendant's tenth bill of exceptions	39	26
Testimony of Charles De Witt (continued)	39	26
Defendant's eleventh bill of exceptions	43	29
Testimony of Charles De Witt (continued)	43	29
Deposition of Robert P. Frist, etc	52	35
Testimony of Robert P. Frist, taken before notary public	58	40
Defendant's twelfth bill of exceptions	62	43
Objections to testimony overruled	62	43
Defendant's thirteenth bill of exceptions	63	43
Objections to testimony overruled	63	43
Defendant's fourteenth bill of exceptions	63	43

	Original.	Print
Objections to testimony overruled	63	43
Defendant's fifteenth bill of exceptions	64	44
Objections to testimony overruled	64	44
Defendant's sixteenth bill of exceptions	65	44
Objection to testimony overruled	65	45
Defendant's seventeenth bill of exceptions	65	45
Objection to testimony overruled	65	45
Defendant's eighteenth bill of exceptions	66	45
Objection to testimony overruled	66	45
Defendant's nineteenth bill of exceptions	66	45
Objection to testimony overruled	66	45
Defendant's twentieth bill of exceptions	67	46
Objections to testimony overruled	67	46
Defendant's twenty-first bill of exceptions	67	46
Objections to testimony overruled	67	46
Defendant's twenty-second bill of exceptions	68	47
Objections to testimony overruled	68	47
Defendant's twenty-third bill of exceptions	69	47
Objections to testimony overruled	69	47
Defendant's twenty-fourth bill of exceptions	69	48
Objections to testimony overruled	69	48
Defendant's twenty-fifth bill of exceptions	70	48
Objection to testimony overruled	70	48
Defendant's twenty-sixth bill of exceptions	71	49
Objections to testimony overruled	71	49
Defendant's twenty-seventh bill of exceptions	72	49
Objections to testimony overruled	72	49
Defendant's twenty-eighth bill of exceptions	72	50
Objections to testimony overruled	72	50
Defendant's twenty-ninth bill of exceptions	73	50
Objections to testimony overruled	73	50
Defendant's thirtieth bill of exceptions	74	51
Objections to testimony overruled	74	51
Defendant's thirty-first bill of exceptions	74	51
Objections to testimony overruled	74	51
Defendant's thirty-second bill of exceptions	75	52
Objections to testimony overruled	75	52
Defendant's thirty-third bill of exceptions	76	52
Objections to testimony overruled	76	52
Defendant's thirty-fourth bill of exceptions	76	53
Objections to testimony overruled	76	53
Defendant's thirty-fifth bill of exceptions	77	53
Objections to testimony overruled	77	53
Defendant's thirty-sixth bill of exceptions	78	54
Objections to testimony overruled	78	54
Defendant's thirty-seventh bill of exceptions	79	54
Objections to testimony overruled	79	54
Defendant's thirty-eighth bill of exceptions	79	55
Objections to testimony overruled	79	55
Defendant's thirty-ninth bill of exceptions	80	55

	Original	Print
Objections to testimony sustained in part and overruled in part	80	55
Defendant's fortieth bill of exceptions	81	56
Objections to testimony sustained in part and overruled in part	81	56
Defendant's forty-first bill of exceptions	83	57
Testimony of Robert P. Frist submitted to jury	83	57
Order striking out testimony	83	57
Testimony of Charles M. Kohn	84	58
Lewis W. Lake (recalled)	87	60
Defendant's Exhibit No. 2—Letter from Lewis W. Lake to Cumberland Glass Co., May 17, 1909	87	60
Defendant's Exhibit No. 3—Letter from Lewis W. Lake to Cumberland Glass Company, December 2, 1909	88	61
Plaintiff's prayers	89	62
Defendant's prayers	90	62
Defendant's special exception	92	64
Clerk's certificate	93	65
Opinion, Burke, J	94	65
Judgment	104	72
Petition for writ of error	105	72
Assignment of errors	107	73
Order allowing writ of error and fixing bond	115	78
Bond on writ of error	116	78
Writ of error	120	80
Citation and service	121	81
Clerk's certificate	123	81

1 MARYLAND, *sct:*

At the Court of Appeals of the said State begun and held at the City of Annapolis on the second Monday of January (being the thirteenth day of the same month), in the year of our Lord one thousand nine hundred and thirteen and in the one hundred and thirty-seventh year of the Independence of the United States of America.

Were present:

Boyd, Chief Judge.
Briscoe, Burke, Thomas, Pattison, Urner, Stockbridge, Constable, Associate Judges.

C. C. MAGRUDER, *Clerk.*

Among other were the following proceedings, to-wit:

2 *Transcript of Record from the Superior Court of Baltimore City in the Case of*

THE CUMBERLAND GLASS MANUFACTURING COMPANY, a Corporation, Appellant,
vs.
CHARLES DE WITT, Trading as Charles De Witt & Company, Appellee.

To the Court of Appeals of Maryland.

Arthur L. Jackson, Paul M. Burnett, Henry H. Dinneen, For Appellant.
Thomas G. Hayes, Lewis W. Lake, For Appellee.

3 Action commenced on the 2nd day of August, 1910.

Declaration.

The plaintiff for cause of action against the defendant, by Lewis W. Lake, his attorney, on information states:

1. That the plaintiff, Charles De Witt, is engaged in business in the City of Baltimore, in the State of Maryland, as a dealer in imported and domestic bottles, demijohns, flasks, bottle caps, brewers' and bottlers' materials and supplies, and he has been engaged in said business upon his own account ever since the year 1886.

2. That the defendant, the Cumberland Glass Manufacturing Company, a body corporate, incorporated under the laws of the State of New Jersey, is engaged in the manufacture of glass bottles, window glass and glass specialties and novelties, and conduct their factory at Bridgeton, in the State of New Jersey, and do business

in divers adjoining and neighboring States. That the Cumberland Glass Manufacturing Company have received a certificate, in compliance with the Act of 1908, Chapter 240, sections 67 and 68, and do business in this State, and conduct an office at No. 1112 Union Trust Building, in the City of Baltimore, State aforesaid.

3. That the said Charles De Witt did, on the 8th day of February, 1906, enter into a contract with one, the Mallard Distilling Company of New York City, to supply them with 2000 gross of ½ pint, lettered Gin Flasks, eight ounce capacity, at the price of two dollars and forty cents ($2.40) per gross.

4. That the Cumberland Glass Manufacturing Company did, with knowledge of the existing contract, on or about the 15th of February, 1906, by and through the medium of their agents, visit the said Mallard Distilling Company, and maliciously and without just cause, with the intention of injuring the plaintiff and to derive a benefit for itself, cause, induce and procure the said Mallard Distilling Company to break and violate their contract with the said Charles De Witt.

4 5. That the said Charles De Witt did, at that time, accuse the said Cumberland Glass Manufacturing Company of having interferred with and caused the Mallard Distilling Company to break the contract aforesaid, with him, all of which the said Cumberland Glass Manufacturing Company did absolutely deny that they had in any way interferred with the contract aforesaid, or procure or cause the same to be broken, that the said Charles De Witt has been unable to procure any proof against the said Cumberland Glass Manufacturing Company of this violation of duty owed to the said Charles De Witt, and that said proof of these facts *were* not known or exhibited to the said Charles De Witt until the latter part of the year 1909, but were fraudulently concealed by said Cumberland Glass Manufacturing Company.

6. That the said Charles De Witt had a profit *to* eight hundred dollars ($800.00) in the contract aforesaid, of which he was unable to save the whole or any part thereof.

II.

7. That the plaintiff, on or about December 22nd, 1908, entered into a contract with the defendant, the Cumberland Glass Manufacturing Company, to purchase for them, and they to supply the plaintiff, 500 gross Amber lettered, Bulk beers, crown finish, sixteen ounce weight, at three dollars and ten cents ($3.10) per gross, for the National Brewing Company of Steelton, Pennsylvania, less Baltimore rate of freight, in carload lots.

8. That the said Cumberland Glass Manufacturing Company did deliver, as part of contract, 264 7/12 gross of the said bottles aforesaid set out in paragraph No. 7, leaving a balance due of 235 5/12 gross due to the plaintiff, Charles De Witt, which balance was to be shipped to the plaintiff not later than June 1st, 1909.

9. That on the 18th day of March, 1909, the said defendant did, without just cause, refuse to supply the plaintiff with the remaining

235 5/12 gross, and did repudiate this part of their contract and refused to fulfill the same.

10. That the plaintiff, Charles De Witt, was forced to procure the bottles elsewhere at a cost of three dollars and fifty cents ($3.50) per gross, or an advance of forty cents above the contract price with the defendant.

5 III.

11. That the plaintiff, on or about March 9th, 1909, entered into a contract with the Cumberland Glass Manufacturing Company, through their agent, A. R. McClellan, to purchase from them, and they to supply, 200 gross Amber lettered, eighteen ounce weight, Bulk Beers at Three Dollars and Thirty-five cents ($3.35) per gross, less Baltimore rate of freight, in carload lots.

12. That on or about March 11th, 1909, the said Cumberland Glass Manufacturing Company did, verbally, confirm and accept the contract aforesaid with the plaintiff.

13. That on or about March 19th, 1909, the Cumberland Glass Manufacturing Company did refuse to fulfill the contract aforesaid, and did repudiate the same.

14. That the plaintiff, Charles De Witt, was compelled to purchase the goods elsewhere at a price of Three Dollars and Sixty cents ($3.60) per gross, or an advance of twenty-five cents per gross.

Wherefore the plaintiff claims $2,000.00.

L. W. LAKE,
Attorney for Plaintiff.

The plaintiff elects to have this case tried before a jury.

L. W. LAKE,
Attorney for Plaintiff.

Rule plea.

Docket Entry.

10th September, 1910.—Plea did not commit the wrongs alleged short, and issue.

6 *Plea on Equitable Grounds.*

(Filed by Leave of Court 9th March, 1911.)

To the Honorable the Judge of said Court:

The time for filing pleas in the above cause without an order of Court having expired, the defendant herein, by Paul M. Burnett, respectfully prays leave to file the attached additional plea on equitable grounds, to the plaintiff's Declaration and each and every count thereof.

And as in duty bound will ever pray, &c.

PAUL M. BURNETT,
Defendant's Attorney

Leave granted as prayed this 9th day of March, 1911.
JAMES P. GORTER.

Additional Plea on Equitable Grounds.

And the said defendant, leave of Court being first had and obtained, files this additional plea to the plaintiff's Declaration, and for cause of defense on equitable grounds to each and every count thereof avers and says:

That prior hereto, to wit, on the 8th day of February, 1910, subsequent in point of time to the date of the commission of each and every alleged wrong set forth in said plaintiff's Declaration, the said plaintiff, Charles De Witt, individually and trading as Charles De Witt & Company, by order of the United States District Court in and for the District of Maryland, sitting as a Bankruptcy Court, was, under and by virtue of the laws of the United States, adjudicated a bankrupt; that in the list of debts due and owing by said Charles De Witt, and returned by him to said United States District Court conformably to the law, the said De Witt, plaintiff herein as aforesaid, did return this defendant, said Cumberland Glass Manufacturing Company, as creditor of him, the said Charles
7 De Witt, in the sum of seven hundred and ninety 03/100 dollars ($790.03), which said claim was duly filed by this defendant against said De Witt in said bankruptcy proceedings; that among the unliquidated assets reported to said Bankruptcy Court by said plaintiff as constituting a part of his said estate was a "chose in action" against this said defendant, listed as a claim of said De Witt's against this defendant as unliquidated damages for commissions and breach of contract, amounting to nine hundred and forty 00/00 dollars ($940); that thereafter, to wit, on the 26th day of March, 1910, the said plaintiff (bankrupt), Charles De Witt, filed a petition in said United States District Court for the District of Maryland in said cause, wherein he set out that he had submitted a composition agreement to his creditors whereby they, said creditors, were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his said bankrupt estate; further, that a majority in amount of his creditors had agreed to accept the terms of said composition agreement, wherefore the said De Witt prayed that the same be confirmed by said Court; that the defendant in this suit, though one of the creditors of the said bankrupt, did not agree in writing, pursuant to the provisions of the Federal Bankrupt Act, or otherwise, to accept said settlement, but that as a majority in amount of said creditors did accept said offer, the same was ratified nisi by said Federal Court as of course; that item No. 93 in said composition account allowed to this defendant the sum of one hundred and fifty-eight 01/00 dollars ($158.01) as its dividend on its said claim of seven hundred and ninety 03/00 Dollars ($790.03), whereas no debit was made against it, said Cumberland Glass Manufacturing Company, by reason of the alleged claim of said De Witt against this defendant for the aforesaid sum of nine hundred and

forty 00/00 dollars ($940); that under and by virtue of the provisions of Section 68 A of said Federal Bankrupt Act it was and became the duty of the Referee in Bankruptcy and the Trustee in Bankruptcy representing the bankrupt estate of said De Witt, to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt against his said creditor against the claim of said creditor against the said bankrupt, and pay, or demand the payment to the estate of, the difference between the accounts thus stated; that as the said Referee, Trustee and Bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account that any
8 portion of the aforesaid sum of nine hundred and forty 00/00 dollars ($940) was justly due and owing by this defendant to the then bankrupt estate of said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant being led to believe by the action of said Referee, Trustee and Bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty to have spoken and set out the same, if it was found by them to be due, against this defendant in said composition account, did not exercise its right to except to the ratification of said composition account, but unwillingly accepted the settlement of twenty cents on the dollar, and suffered said composition account to be finally ratified and confirmed, and distribution to be made according to the tenor thereof; that this defendant received and accepted its said dividend of twenty per cent. therefrom in satisfaction of its claim solely because of its well-grounded belief (induced by the action of said Bankrupt and his Trustee in bankruptcy in failing to allow said De Witt's alleged claim against it, said Cumberland Glass Manufacturing Company, in said composition account), that the payment to it by said bankrupt of said dividend of twenty per cent. and its acceptance by this said defendant operated as a mutual discharge of any and all claims which the parties to this suit then had or claimed to have against each other.

And this defendant says that this suit is brought in the attempt to recover on said claim against it as returned in his schedule of assets by said De Witt to said Federal Court, in Bankruptcy, wherefore the defendant submits that the said plaintiff's conduct and claim is unconscionable and inequitable, and recovery against this defendant should be denied him in the premises.

PAUL M. BURNETT,
Defendant's Attorney.

(Rule replication.)

9 *Demurrer to Plea on Equitable Grounds.*

(Filed 7th October, 1911.)

Mr. Clerk:

Please enter demurrer in above entitled case upon the plea filed by the defendant on equitable grounds.

LEWIS W. LAKE,
Plaintiff's Attorney.

(Issue joined short on demurrer.)

Docket Entry.

18th December, 1911.—Demurrer sustained as to Narr., with leave to file an amended Narr. in fifteen days.

NOTE.—The original declaration and the plea, etc., to same were inserted in the record by order of appellant's attorney.

Amended Narr.

(Filed by leave of Court on the 28th December, 1911.)

The plaintiff, leave of Court being first had and obtained, files this Amended Declaration as his cause of action:

The plaintiff for cause of action against the defendant, by Lewis W. Lake, his attorney, on information states:

1. That the plaintiff, Charles De Witt, is engaged in business in the City of Baltimore, in the State of Maryland, as a dealer in imported and domestic bottles, demijohns, bottle caps, brewers' and bottlers' materials and supplies, and he has been engaged in said business upon his own account ever since the year 1886.

10 2. That the defendant, The Cumberland Glass Manufacturing Company, a body corporate, incorporated under the laws of the State of New Jersey, is engaged in the manufacture of glass bottles, window glass and glass specialties and novelties, and conduct their factory at Bridgton, in the State of New Jersey, and do business in divers adjoining and neighboring States. That the Cumberland Glass Manufacturing Company have received a certificate, in compliance with the Act of 1908, Chapter 240, Sections 67 and 68, and do business in this State, and conduct an office at No. 1112 Union Trust Building, in the City of Baltimore, State aforesaid.

3. That the said Charles De Witt did, on the 8th day of February, 1906, enter into a written contract with one, the Mallard Distilling Company of New York City, to supply them with 1,000 gross of ½ pint, lettered Gin Flasks, eight ounce capacity, at the price of two dollars and forty cents ($2.40) per gross, and that on or about the same date did verbally enter into an additional contract with the said Mallard Distilling Company for 1,000 gross of bottles at two dollars and forty cents ($2.40) per gross, which bottles were to be

made identical in every respect to those specified in the contract above mentioned, and dated February 8th, 1906.

4. That the Cumberland Glass Manufacturing Company did, with knowledge of the existing contract, on or about the 15th day of February, 1906, by and through the medium of their agents, visit the said Mallard Distilling Company, and maliciously and without just cause, with the intent to injure the plaintiff and to derive a benefit for itself, cause, induce and procure the said Mallard Distilling Company to rescind, break and violate their contracts with the said Charles De Witt.

5. That the said Charles De Witt did, at that time, charge the said Cumberland Glass Manufacturing Company of having interfered with and causing the Mallard Distilling Company to break the contracts aforesaid, with him, all of which the said Cumberland Glass Manufacturing Company did absolutely deny, that they had in any way interfered with the contracts aforesaid, or did procure or cause the same to be broken, that the said Charles De Witt was unable to procure any proof sufficient against the said Cumberland Glass Manufacturing Company of this violation of duty owed to him, the said Charles De Witt, and that the proof of the
11 facts were not known or exhibited to the said Charles De Witt until the latter part of the year 1909, but were fraudulently concealed and withheld by the said Cumberland Glass Mfg. Co.

6. That the said Charles De Witt has sustained severe losses and been greatly damaged as a result in consequence of the acts of the said Cumberland Glass Manufacturing Company.

Wherefore the plaintiff claims $2,000.00 damages.

LEWIS W. LAKE,
Attorney for Plaintiff.

Service of copy admitted this Dec. 27th, 1911.

PAUL M. BURNETT,
Attorney for Defendant.

(Rule plea.)

Pleas.

(Filed 29th December, 1911.)

And the said Cumberland Glass Manufacturing Company, defendant in this action, by Paul M. Burnett, its attorney, in response to the plaintiff's Amended Declaration, says:

First. For a first plea, that it did not commit the wrong therein alleged; and

Second. For a second plea, that the alleged cause of action recited in said narr. did not accrue within three years before the filing of this suit; and

Third. For a third plea, says that prior hereto, to wit: on the 8th day of February, 1910, subsequent in point of time to
12 the date of the commission of each and every alleged wrong set out in said amended declaration, the said plaintiff, Charles

De Witt, individually and trading as Charles De Witt & Company, by order of the United States District Court, in and for the District of Maryland, was, under and by virtue of the laws of the United States, adjudicated a bankrupt; that in the list of debts due and owing by said De Witt and by him returned to said United States Court conformably to the law, the said De Witt, plaintiff herein as aforesaid, did return this defendant, said Cumberland Glass Manufacturing Company, as a creditor of him, the said Charles De Witt, in the sum of seven hundred and ninety 03/00 dollars ($790.03), which said claim was duly filed by this defendant against said De Witt in said bankruptcy proceedings; that among the unliquidated assets reported to said Bankruptcy Court by said plaintiff De Witt as constituting a part of his estate was a "chose in action" against this said defendant, listed as a claim of said De Witt's against this defendant as unliquidated damages for commissions and breach of contract, amounting to nine hundred and forty dollars ($940); that thereafter, to wit: on the 26th day of March, 1910, the said plaintiff (bankrupt) Charles De Witt filed a petition in said United States District Court for the District of Maryland, in said cause, wherein he set out that he had submitted a composition agreement to his creditors whereby they, said creditors, were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his said bankrupt estate: further, that a majority in amount of his said creditors had agreed to accept the terms of said composition agreement, wherefore the said De Witt prayed that the same be ratified by said Court; that the defendant in this suit, though one of the creditors of the said bankrupt, did not agree in writing, pursuant to the provisions of the Federal Bankrupt Act, or otherwise, to accept said settlement, but that as a majority in amount of said creditors did accept said settlement, the same was ratified nisi by said Federal Court as of course; that item No. 93 in said composition account allowed to this defendant the sum of one hundred and fifty-eight 01/00 dollars ($158.01) as its dividend on its said claim of seven hundred and ninety 03/00 dollars ($790.03), whereas no debit was made against it, said Cumberland Glass Maanufacturing Company, by reason of the alleged claim of said De Witt against this defendant for the aforesaid sum of nine hundred and forty dollars ($940); that under and by virtue of the provisions of Section 68-*a* of said Federal Bankruptcy Act it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said De Witt to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to setoff the claim of such bankrupt against his said creditor against the claim of said creditor against the said bankrupt, and pay, or demand the payment to the bankrupt estate of, the difference between the accounts thus stated; that as the said referee, trustee and bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of $940 was justly due and owing by this de-

13

fendant to the then bankrupt estate of the said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty to have spoken and set out the same, if it was found by them or any of them to be due, against said defendant in said composition agreement, did not exercise its right to except to the ratification of said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of twenty cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of twenty per cent. therefrom in satisfaction of all its claims against said De Witt and in exoneration by said De Witt from any and all claims which said De Witt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend and its acceptance by this defendant operated as a final settlement and adjustment, in a Court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended narr. is res judicata.

PAUL M. BURNETT,
Attorney for Defendant.

(Rule replication.)

14 *Replication and Demurrer.*

(Filed 2nd January, 1912.)

And the said Chas. De Witt, plaintiff in this action, by Lewis W. Lake, his attorney, for replication to the pleas to the Amended Declaration says:

For replication to the first plea: The plaintiff joins issue thereon.

To the second plea: The plaintiff, demurring thereto, and says that the same is bad in substance and insufficient in law.

To the third plea: The plaintiff, demurring thereto, and says that the same is bad in substance and insufficient in law.

LEWIS W. LAKE,
Attorney for Plaintiff.

Docket Entry.

22nd Jan., 1912.—Demurrer to second plea overruled and demurrer to third plea sustained with leave to amend in fifteen days.

Replication to Second Plea.

(Filed 29th January, 1912.)

And the said Charles De Witt, plaintiff in this action, by Lewis W. Lake, his attorney, for replication to the second plea to the Amended Declaration says:

That the said cause of action recited in the narr. did accrue within three years prior to the filing of the suit, inasmuch as the said Cumberland Glass Mfg. Co., the defendant in the cause, did fraudulently keep the plaintiff in ignorance of the cause of action although he had used ordinary diligence to discover the same.

LEWIS W. LAKE,
Attorney for Plaintiff.

15 *Demurrer to Replication to Second Plea.*

(Filed 29th January, 1912.)

And the said Cumberland Glass Manufacturing Company, defendant in this action, by Paul M. Burnett and Hy. H. Dinneen, its attorneys, as to the plaintiff's replication to the defendant's second plea to the Amended Declaration, says:

That said replication is bad in substance and insufficient in law, and therefore the defendant demurs thereto.

PAUL M. BURNETT,
HENRY H. DINNEEN,
Defendant's Attorneys.

Issue joined short on demurrer.

Docket Entry.

3rd February, 1912.—Demurrer to replication to second plea sustained with leave to amend.

Amended Replication to Second Plea.

(Filed 5th February, 1912.)

The plaintiff, leave of Court being first had and obtained, files this amended replication to the second plea of the defendant to the amended declaration.

And the said Charles De Witt, plaintiff in the above cause of action by Lewis W. Lake, his attorney, for replication to the second plea of the defendant, says:

That the said cause of action did accrue within three years prior to the filing of the said suit, inasmuch as the said Cumberland Glass Manufacturing Company, the defendant in the said cause, did fraudulently keep the plaintiff in ignorance of the said cause
16 of action by fraudulently, deceitfully and dishonestly denying that it had in any way been guilty of any of the acts alleged in the said cause of action as set out in the amended declaration of the plaintiff, though the plaintiff did charge the defendant with the same about the first of March of the year 1906, and the said facts did not come to the knowledge of the said plaintiff until the latter part of the year 1909, though he had used ordinary diligence to discover the same.

L. W. LAKE,
Attorney for the Plaintiff.

Demurrer to Amended Replication to Second Plea.

(Filed 8th February, 1912.)

And the said Cumberland Glass Manufacturing Company, defendant in this action, by Henry H. Dinneen, its attorney, now comes and says, etc., that the plaintiff's amended replication to the defendant's second plea to the amended narr. is bad in substance and insufficient in law, and the defendant demurs thereto.

HENRY H. DINNEEN,
Defendant's Attorney.

Docket Entry.

14th March, 1912.—Demurrer to amended replication to second plea overruled.

17 *Rejoinder to Amended Replication to Second Plea.*

(Filed 14th March, 1912.)

And the said Cumberland Glass Manufacturing Company, defendant, leave of Court being first had and obtained in the premises, for rejoinder to the amended replication to the second plea, says:

That this defendant is not now and never has been under any legal obligation to disclose to said plaintiff any facts whatsoever concerning its (said defendant's) business transactions with anyone, and this defendant says that it did not, on or about the 1st day of March, 1906, or at any other time, fraudulently, deceitfully and dishonestly conceal the plaintiff's alleged cause of action, or that it, said defendant, at any time, did, or suffered at any time to be done, any fraudulent, deceitful and dishonest action whereby the said plaintiff was precluded from obtaining knowledge of the facts constituting the alleged wrong declared on by said plaintiff.

And the defendant denies that said plaintiff, in the years 1906, 1907 and 1908, used ordinary diligence to discover the facts concerning the alleged wrong declared on, and the defendants says that ordinary diligence required that said plaintiff, shortly after the commission of the alleged wrong, make inquiry of said Mallard Distilling Company, and that had the plaintiff so acted he would have, in the year 1906, discovered the facts whereon his case is based, inasmuch as said Mallard Distilling Company was, then and now, as fully aware of all the facts pertaining thereto as this defendant.

Wherefore, the defendant prays judgment, etc.

PAUL M. BURNETT,
HENRY H. DINNEEN,
Defendant's Attorneys.

Issue joined short on rejoinder.

18 *Docket Entry.*

11th October, 1912.—Jury sworn.
15th October, 1912.—Verdict in favor of the plaintiff for $800.00. Judgment on verdict nisi.
16th October, 1912.—Defendant's motion for a new trial filed.

Petition and Order of Court.

(Filed 16th October, 1912.)

The defendant prays the Court to extend the time for signing, sealing and filing bills of exceptions in this case for a period of thirty days from the day of the determination of its motion for a new trial.
And as, &c.,

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
Att'ys for Defendant.

Ordered this 16th day of October, 1912, by the Superior Court of Baltimore City, that the defendant's time for presenting and having signed, sealed and filed the Bills of Exception in the above case be and the same hereby is extended for a period of thirty days from the day when the defendant's motion for a new trial is determined.

JAMES M. AMBLER.

Docket Entry.

2nd November, 1912.—Defendant's motion for a new trial "Overruled."
2nd November, 1912.—Judgment on verdict absolute in favor of the plaintiff for $800.00.

19 *Defendant's Order for Appeal.*

(Filed 2nd November, 1912.)

Mr. Little, Clerk:
Please enter, on behalf of the Cumberland Glass Manufacturing Company, defendant, an appeal to Court of Appeals from the judgment in the above cause.

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
Attorneys for Def'nd't.

At the time of filing the Order for Appeal the defendant filed an affidavit that the appeal is not taken for delay, and also filed a duly approved Appeal Bond.

Petition and Order of Court.

(Filed 25th November, 1912.)

To the Hon. James M. Ambler, Judge, etc.:

The defendant, Cumberland Glass Manufacturing Company, respectfully represents that the time for signing, sealing and filing its Bills of Exception in the premises will shortly expire; that although your petitioner has all but completed the preparation of said exceptions, yet the same will have to be by it presented to the plaintiff's attorneys for their examination and inspection, and possible correction, all of which cannot be done within the time heretofore allowed for the filing of such exceptions.

Wherefore, the defendant prays that the time for signing, sealing and filing the above exceptions be extended for a period of thirty days from date.

And as in duty, etc.,

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
Defendant's Att'ys.

Ordered this 25th day of November, 1912, on the foregoing petition, that the defendant's time for signing, sealing and having filed its Bills of Exceptions in the above case be and the same hereby is extended for a period of thirty days from date, to wit, the 26th day of December, 1912.

JAMES M. AMBLER.

Petition and Order of Court.

(Filed 19th December, 1912.)

To the Hon. Jas. M. Ambler, Judge, etc.:

The petition of the Cumberland Glass Mfg. Co. respectfully shows:

First. That on November 24th, 1912, its time for filing bills of exception in the premises was extended until the 26th day of December, 1912.

Second. That the bills of exception, some fifty in number, have been prepared by your petitioner's attorneys, and are now in the hands of counsel for De Witt (plaintiff) for examination and possible correction.

Third. That the time for signing bills of exception may expire before your petitioner's attorneys and those representing Mr. De Witt agree on their form and contents.

Wherefore, it prays that its time for filing and having signed said bills of exception be extended for a period of ten days from Dec. 26th, 1912.

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
For C. G. Co.

21 Ordered this 19th day of December, 1912, that the time for signing, sealing and filing the Bills of Exception in the above case be and the same hereby is extended until the 6th day of Jan'y, 1913, inclusive of said date.

JAMES M. AMBLER.

Bills of Exceptions.

(Filed 28th December, 1912.)

In the Superior Court of Baltimore City.

CHARLES DE WITT, Trading as Charles De Witt & Company,
vs.
THE CUMBERLAND GLASS MANUFACTURING COMPANY, a Body Corporate, Duly Incorporated.

At the trial in this case after the same had been called, but before the jury was impanelled or sworn, the defendant, by its counsel, Arthur L. Jackson, addressed the Court as follows:

"Before the jury is sworn in this case, to comply with the ordinary practice, I want to give notice to the plaintiff that the defendant will, at the proper time, object to the deposition of a certain witness Frist, which has been taken in this case, because since the taking of the deposition the issues have been changed, and for other reasons that are apparent on the face of the record; and, further, the defendant proposes to object to each and every question and answer of the said deposition for the reasons above named and for other reasons to be stated at that time."

22 Whereupon,

(Mr. HAYES:) I don't know whether this is the time to show the utter illegality of any attempt which makes to eliminate the deposition, but our Court of Appeals has emphatically said that anything which went to deprive either party of the effects of a deposition must be done after giving reasonable notice. I don't know that this will give us any notice. It is usually customary for counsel to give us the exceptions to the questions and answers in writing. I think his statement goes further than what I am conceding is right. We should have been told of the change of issue prior to this time so that we could have met it, if necessary, if he objected, but as to the propriety of any testimony he has a right to object, of course. Does your Honor understand me?

(The COURT:) "In a measure."

(Mr. HAYES:) "Anything which deprives a litigant of a deposition antecedent to taking it, which goes to striking it down for any irregularity, the opposite side must be told of that so as to give them reasonable notice of it, and therefore anything which goes to affecting the deposition so far as its admissibility for any of those reasons other than the illegality of the testimony is concerned, has no standing, sir."

(The COURT:) I will overrule the objection.

To which action of the Court the defendant by its counsel then and there excepted and prays the Court to sign and seal this its first bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Rule twenty-five of the Superior Court of Baltimore City in force at the time the ruling in these exceptions was taken is as follows:

"If the plaintiff or defendant in any cause, whether at issue or not, shall be desirous of obtaining a commission to examine any witness or witnesses who reside without the State, the Court, being satisfied, by affidavit or otherwise, of the propriety thereof, he shall first file in the clerk's office a copy of the interrogatories which are to be propounded to the witness or witnesses, with the names
23 of the witnesses to be examined, together with the name or names of a commissioner or commissioners, and shall serve the opposite party or his attorney with a copy of the interrogatories and the name or names of the commissioners, at least ten days before he applies to have it issued. If the opposite party shall not, within ten days from the time of such service, file cross-interrogatories, together with the name or names of a commissioner or commissioners on his part, the commission shall issue ex parte to the commissioner or commissioners named. If the opposing party shall, within ten days, file the name or names of a commissioner or commissioners, then the commission shall be issued by the clerk to one of the commissioners named on each side, unless the parties shall agree upon other persons to act as commissioners, in which case the commission shall issue to the person or persons agreed on. The Court, in its discretion, for cause shown, may shorten the time limited for issuing a commission. Unless a commission shall be issued during the term at which the cause shall have been first entered on the trial docket, it shall be no ground for continuance, unless the Court in its discretion shall so order.

Exceptions to the execution and return of a commission shall be made before the jury is sworn in the case, otherwise they shall be considered as waived.

If the commission shall have been returned and opened, and notice thereof be had by the opposing party, fifteen days before the next succeeding return day, exceptions to the execution and return thereof shall be filed on or before the day following the said return day. Exceptions so filed shall be heard on the regular call of the law docket.

JAMES M. AMBLER.

Defendant's Second Bill of Exceptions.

After the notice and ruling on exceptions set forth in the First Bill of Exceptions had all been disposed of which said First Bill of Exceptions is hereby made a part hereof as fully as if herein incorporated in full the jury in the above case was duly impanneled and sworn and thereupon in order to sustain the issues joined on his

part the plaintiff having been duly sworn testified on direct-examination as follows:

24 That his name is Charles De Witt, that he lives at Roland Park, in Baltimore County, and is engaged in business in Baltimore City dealing in bottles and bottlers' supplies generally. That he has been in business for twenty-five years. That he is a jobber and does not manufacture. That he has known the defendant for ten or twelve years and has dealt with them to a small extent.

Q. Now first I want to show you this bottle (indicating). I place in your hands a glass flask with the name on it "Mallard Distillery, Baltimore and New York, Patent Applied for;" do you recognize it?

A. I do.

Q. Will you tell us what it is?

A. That is a special *propriety* mold, one-half pint bottle, that they use in their business for bottling gin.

Q. Did you have that mold made to use as a bottle?

A. I did.

Q. Will you tell the Court and jury of the occurrence of any visit by Mr. MacLellan to your office in February, 1906, and state who Mr. MacLellan is?

(Mr. JACKSON:) We don't know who Mr. MacLellan is or anything else; we object unless that is followed up.

A. I had telephoned Mr. MacLellan to call at my office to make us some prices on beer bottles the morning I returned from New York, about the 8th or 9th of February. I had this bottle laying on my desk. Mr. MacLellan was a friend of mine and I did business with him.

Q. You were dealing with him at that time as the representative of what company?

A. The Cumberland Glass Company?

Q. What do you mean by that?

A. The local agent of the Cumberland Glass Manufacturing Company, all their local business.

Q. I want you to let the Court and jury know the character of your dealings with the Cumberland Glass Manufacturing Company through MacLellan.

25 A. For the past ten or twelve years, to my knowledge MacLellan has been the representative of the Cumberland Glass Manufacturing Company.

Q. Now go ahead and tell us the date of the conversation?

A. The date was the early part of February about the 8th or 9th, 1906. MacLellan picked up the flask on my desk, it was exposed. He said "Let me give you a price on this. Do they use a good many bottles?" I said, "Yes, Arthur, I just made a contract for 2,000 gross." He said, "I can get you a good price from the Cumberland people"—and Mr. MacLellan said that if I would mail this flask to the Cumberland Glass Manufacturing Company for him, as he did not have the facilities to mail it in his office, he would get me a better price than I could get anywhere. He said, "If I would mail the flask he would do the writing." Four days after that the order

was cancelled by the Mallard Company in New York. I went to see them and they absolutely repudiated——

Q. What did the Cumberland Glass Manufacturing Company say to you?

A. I heard nothing from the Cumberland Glass Manufacturing Company, absolutely not a word.

Q. You sent that flask through the mail to the Cumberland Glass Manufacturing Company at the request of MacLellan?

A. Yes.

Q. You are claiming 200 flasks from the Mallard Distilling Company—2000 gross—was the contract in writing or oral?

A. I had taken an order personally for 1000 gross about December — I took a verbal order from the Mallard Distilling Company for 1000 gross of these flasks and on February 6th I visited them and got another order for 1000 gross which they confirmed in writing.

(Mr. HAYES:) I will show this letter to counsel (counsel then passed to the defendant's counsel the written letter for examination). This letter is as follows:

26 PLAINTIFF'S EXHIBIT No. 1.

February 8th, 1906.

Mallard Distilling Co., New York.

GENTLEMEN: We have entered your order for (1,000) one thousand gross half-pint lettered gin flasks, eight ounce weight and eight ounce capacity, same as before.

We are to make these flasks at once, and you are to take two (2) cars not later than July 31st, 1906, and you are to take two remaining cars not later than July 31st, 1907.

Price to be $2.40 per gross, f. o. b. New York, packed in crates of one gross each. Terms 30 days or 2% for cash in ten days. Guaranteed first-class flint ware. Breakage not to exceed 2%.

Yours truly,

CHAS. DE WITT & CO.

Accepted:

MALLARD DISTILLING CO. (Rubber-stamped.)

CHAS. M. KOHN (Written in ink),

Sec'y & Treas. (Rubber-stamped.)

(Mr. JACKSON:) We object to this letter.

(The COURT:) Objection overruled.

To which action of the Court the defendant by its counsel then and there excepted and prays the Court to sign and seal this its second bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

27 Thereafter the witness being still upon direct examination further testified as follows:

Q. Whose signatures are those (indicating)?

A. That is my own signature.
Q. And whose other signature?
(Mr. JACKSON:) How does he know the other signature?
Q. Whose is the other signature? Do you know the signatures to that paper?
A. I certainly do.
Q. Whose is that other signature?
A. I have done business with them for years, and I know the rubber stamp of the Mallard Distilling Company.

(Mr. JACKSON:) We object to that.

(The WITNESS:) They stamp them and sign it.
Q. Do you know the signature in pen and ink, too?
A. No; I could not swear to that.
Q. Haven't you dealt with those people repeatedly?
A. I have.
Q. And seen the signature?
A. Yes.
Q. Can't you, to the best of your information and knowledge——

(Mr. JACKSON:) That is flagrantly leading.
(The COURT:) He stated he did not know that writing.
(Mr. HAYES:) Can I ask him if he has seen the signature written?
(The COURT:) No; he stated he did not know.
(Mr. HAYES:) I offer then to inquire of this witness, asking him to look at the writing under the word "accepted" and state to the jury whether or not he has ever seen on letters which he has received from the firm whose name appears there.
(The COURT:) Overruled.
28 (Mr. HAYES:) Now we offer this paper in evidence.
(Objected to; objection sustained.)

After all the testimony taken in the First and Second Bills of Exceptions had all been taken as therein set out, which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated in full, the plaintiff, being still under direct examination, testified further as follows:

Q. Now, Mr. De Witt, you have already stated in your testimony you had an oral contract. Tell the Court and jury what that was?

(Objected to.)
(The COURT:) Mr. Jackson, am I to presume that an order for 1,000 flasks is worth more than $10.00?
(Mr. JACKSON:) Yes, sir; the pleadings show that 1,000 are worth $800.00. The narr. itself shows the amount of the claim.
(Mr. HAYES:) If the Court will suspend with this witness, Mr. Lake can prove the signature.

Whereupon LEWIS W. LAKE, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

"That he is a member of the bar and counsel of record for the plaintiff."

Q. I want to put this paper in your hands; the written name to the left under the word "accepted"; direct your attention to that, and tell the Court and jury whether or not you had an interview with Mr. Kohn at any time in New York, and if so whether you showed him that paper and what he said as to that signature?

To which question the defendant objected by its counsel, but the Court overruled the objection and the defendant by its counsel excepted. Whereupon the witness answered the question, as follows:

A. I don't know what the date was, but it was the date the deposition of Mr. Charles M. Kohn was taken. I saw him twice that day. In the morning when I saw him I had this contract with
29 me. I was taking the depositions and I showed Mr. Kohn this contract and asked him if that was his signature, and he said it was.

Wherefore the defendant prays the Court to sign and seal this its Third Bill of Exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Fourth Bill of Exceptions.

After all the testimony taken in the first, second and third bills of exceptions had all been offered as therein set forth which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated in full, the plaintiff to sustain the issues joined on his part offered the further testimony of the witness Lake who being then on cross-examination testified as follows:

Q. When you went over to take that deposition of Mr. Kohn's you went over there because the defendant gave you notice that they were going to take this deposition, didn't they?

A. Yes, sir.

Q. Do you mean to say that with knowledge of the fact that the defendant was going to take his deposition, you went to see him and talked to him in the morning?

A. Absolutely.

Q. Was that all that was said?

A. That was practically all.

Q. Well, practically?

A. That is all I can remember. I asked him if he was going to be where the deposition was to be taken and he said yes. I asked him if he did not have a contract for 2,000 gross of bottles with Mr. De Witt and he said he did and that was his signature.

Q. You asked him if he had a contract for 2,000 gross?

A. I asked him if he had an oral contract for 2,000, and then he said yes, that he had an oral contract for 1,000 gross and
30 he also had this contract. I asked him that, I remember, because I wanted to ask him about that in the deposition.

Whereupon the witness Lake was excused and the plaintiff resumed the stand for continuation of direct examination and testified as follows:

(Mr. HAYES:) I now offer this contract in evidence.

(Mr. JACKSON:) I renew my objection.

Whereupon the Court overruled the objection to which action of the Court the defendant then and there excepted, and the plaintiff then offered in evidence the following contract:

PLAINTIFF'S EXHIBIT No. 1.

February 8th, 1906.

Mallard Distilling Co., New York.

GENTLEMEN: We have entered your order for (1,000) one thousand gross half-pint lettered gin flasks, eight ounce weight and eight ounce capacity, same as before.

We are to make these flasks at once, and you are to take two (2) cars not later than July 31st, 1906, and you are to take two remaining cars not later than July 31st, 1907.

Price to be $2.40 per gross, f. o. b. New York, packed in crates of one gross each. Terms 30 days or 2% for cash in ten days. Guaranteed first-class flint ware. Breakage not to exceed 2%.

Yours truly,

CHAS. DE WITT & CO.

Accepted:
MALLARD DISTILLING CO. (Rubber-stamped),
CHAS. M. KOHN (Written in ink),
Sec'y & Treas. (Rubber-stamped).

The defendant prays the Court to sign and seal this, its fourth bill of exceptions which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

31 *Defendant's Fifth Bill of Exceptions.*

After all the testimony taken in the first, second, third and fourth bill of exceptions had all been offered as therein set forth which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated in full the plaintiff further to sustain the issues joined on his part and being still upon direct examination further testified as follows:

Q. You have already stated in your testimony that prior to that you had an oral contract? Tell the Court and jury what that was?

To which question the defendant by its counsel objected.

The Court overruled the objection.

To which action of the Court the defendant then and there excepted. Whereupon the witness answered the question as follows:

A. I stated I had previously sold them 1,000 gross of these very same flasks.
Q. What were the terms of that oral contract?

(Mr. JACKSON): Will all this be admitted subject to exception?
(The COURT): It is all subject to the same exception.
(Mr. JACKSON): All subject to the same ruling?
(The COURT): Yes, sir.

(The WITNESS): I sold them verbally 1,000 gross three or four weeks before the placing of the written order.
Q. What were the terms of that oral contract?
A. The usual terms, 60 days; 2% 10, f. o. b. New York car load lots.
Q. What per gross?
A. $2.40 per gross.
Q. When was the delivery of the contract covering the oral order for flasks?
A. The contracts were always to have a car load in readiness and all to be taken by the first of next July.
32 Q. And what were you to get for the oral contract?
A. $2.40.
Q. How was the goods to be in New York?
A. F. O. B. New York.
Q. How were they packed?
A. Packed in one gross boxes.
Q. Is the box the same as a crate?
A. Same thing.
Q. Terms as to payment?
A. Sixty days, 2 off 10.
Q. Sixty days or thirty?
A. We give sixty days or thirty, both.
Q. What off for cash 10 days?
A. Two per cent.
Q. Was there any guarantee?
A. Guaranteed standard quality.
Q. What is the difference between first class and standard?
A. They are the same thing.
Q. What was said, if anything, as to breakage in the oral contract, not to exceed what?
A. Why 2 per cent.
Q. Did you ever deliver those flasks, 2,000 gross, that is 1,000 under the oral contract and 1,000 under the written?
A. We did not deliver them.
Q. Why.
A. They cancelled the order.

Therefore the defendant prays the Court to sign and seal this its Fifth Bill of Exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

33 *Defendant's Sixth Bill of Exceptions.*

After all the testimony taken in the first, second, third, fourth and fifth bills of exceptions had all been offered as therein set forth which said bills of exception are hereby made a part hereof as fully as if herein incorporated in full, the plaintiff further to sustain the issue joined on his part and being still on direct examination further testified as follows:

Q. Mr. De Witt, state, if you please, what you did, if anything, after you learned of the cancelling of your contract with the Mallard Distilling Company?

A. I went to Bridgeton, New Jersey, to interview the Cumberland Glass Manufacturing Company. I decided to do so, because the Mallard Distilling Company placed the contract with me, they had given me prices from six or eight other manufacturers, and I had been halfway promised this order if my price was in line. When I was told by MacLellan that I would get a low price, and the price was never made to me, and the sample did not come back, and the cancellation of the order came, I went down to Bridgeton to see if I could interfere with the contract. I saw Mr. Perry, and he said they would not be guilty of anything of that sort, that the order had been taken by a Mr. Frist. I asked him if the order could have leaked and he said, no, Mr. Frist comes here, but he does not see the mail. Well, Mr. Perry satisfied me that the order had been received properly. Then about three years after that time I received a letter from Mr. Frist, he addressed me as "Dear Brother and Elk." He said he enclosed a letter from Perry and said, "If you want to know who stole your business, go ask Mr. Perry or Perry," or words to that effect, and I threw that in the waste basket. Well, about three weeks after that a man looked over my desk and said, "Do you know me?" I said, "No." He said, "My name is Frist." I said, "Well, I don't want to talk to you. You must have had some trouble with your firm or you would not have come here," and I ordered him out. Then I looked for that other letter and I could not find it. I afterwards wrote to Mr. Perry and told him I had the letter, and told him if the $800 was not paid my note coming due would not be paid. He replied that the matter was out of his hands, and that Mr. Shoemaker, the vice-president of the company would call on me. The note came due and it was not paid and they threatened to sue. I wrote to them through my attorney that we had the equivalent of the amount and if that did not suit them that they could go ahead and sue, and we would enter a counter-suit.

34 Q. Now, you have said that a result of a conversation with Mr. Perry, you shook hands with him and took his statement?

A. I did.

Q. Did you remain under the belief until you saw Frist?

A. I absolutely did.

Q. And when did you see Frist?

A. About three years after that.
Q. Can't you give me the year?
A. I think it was the early part, it might have been the latter part of 1909. I think it was the early part.
Q. Then, if I understand it, there was no attempt—did you inform the Cumberland Glass Manufacturing Company of the information that you had gotten from Frist and about their connection with it?
A. Absolutely.
Q. And demanded payment?
A. I did.
Q. There has been mentioned the fact about his bankruptcy in the opening statement, and one of the petitioning creditors being the Cumberland Glass Manufacturing Company. I believe there was a composition with you creditors?
A. Yes.
Q. Was the claim of the Cumberland Glass Manufacturing Company against you paid?
A. It was.
Q. The percentum?
A. Yes, sir.
Q. Now, let me make one inquiry about that flask; I think you said something about getting it back. Did you finally get it back from the Cumberland Glass Manufacturing Company?
A. I got the flask in New York from the Mallard Distilling Company.
Q. Now, my brother Lake suggests, very properly, the contract which has been in evidence shows that you were to get from
35 the Mallard Distilling Company $2.40 a gross; that is right, is it not, sir?
A. That is correct.
Q. What would you do, having had this contract with the Mallard Distilling Company; how would you go about providing that flask for the person to whom you had contracted to sell? What would you do?
A. I would buy the flask from the factory that gave me the price before I approached the Mallard Distilling Company.
Q. Wouldn't you prepare the mold?
A. Yes; that would be a minor consideration.
Q. But that is not the question?
A. Yes; I had prepared this mold.
Q. And then you made inquiries of different manufacturers, am I right?
A. You are absolutely incorrect. I had the price before I visited New York to make the quotation to the Mallard Distilling Company. I had the prices.
Q. You had the prices?
A. I had the quotations and made my computations as to price accordingly.
Q. What was the price you had?
A. $2.00 a gross, f. o. b., New York.

Q. Would you be required under the contract to pay the freight, or the manufacturer?

A. The manufacturer pays the freight.

Q. So what you get upon the transaction, if you had carried it out; what you would have gotten would have been 40 cents on the gross?

A. That is correct?

Q. Were you able and prepared, if you had received this contract, to fulfill it?

To which question the defendant by its counsel objected, but the Court overruled the objection and the defendant excepted, whereupon:

36 (Mr. HAYES:) Answer that, please.

A. I am prepared to buy them and pay for them.

Therefore, the defendant prays the Court to sign and seal this, its sixth bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Seventh Bill of Exceptions.

After all the testimony taken in the First, Second, Third, Fourth, Fifth, Sixth Bill- of Exceptions had all been offered as therein set forth, which said bills of exception are hereby made a part hereof as fully as if herein incorporated in full, further to sustain the issues joined on his part and being still on direct examination, further testified as follows:

Q. When you heard of this cancellation of this order, did you see the Mallard Distilling Company, their representative, and ask for anything from them?

A. I did.

Q. After the cancellation of the order or contract in question with the Mallard Distilling Company for these flasks, did you visit the Mallard Distilling Company, and make of them any inquiry as to why they cancelled the order, and if so, what did you get in reply for them?

(Mr. JACKSON:) Inasmuch as the question goes as to whether he went there and made an inquiry, he can answer yes or no, and I will not object, but as to the reply then made I object to that.

Which objection the Court overruled, and the defendant noted and excepted, whereupon the witness answered the question as follows:

A. The day I received the cancellation from the Mallard Distilling Company I went to New York that night. I walked in their office at nine o'clock and I asked them why they cancelled their order. They said they could buy them from seven to eight hundred dollars less on the contract. I tried to find out where,

37 but they would not say. I left there and went to Bridgeton, New Jersey, because I was satisfied that the order had been

stolen from me through this flask. I went down and asked for Mr. Perry, and I was disarmed, and then the matter leaked out three years later——

Therefore the defendant prays the Court to sign and seal this its Seventh Bill of Exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Eighth Bill of Exceptions.

After all the testimony taken in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Bills of Exceptions had all been offered as therein set forth, which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated in full, and further to sustain the issues joined on his part the plaintiff being still upon direct examination the defendant moved the Court to strike out the answer of the witness as above set forth in the seventh bill of exception which motion the Court overruled and the defendant then and there excepted.

Threfore the defendant prays the Court to sign and seal this its eighth bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Ninth Bill of Exceptions.

After all the testimony in the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Bills of Exceptions had all been offered in evidence as therein set forth, which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated, the plaintiff, further to sustain the issues joined on his part, being still on direct examination, further testified as follows:

The witness was then asked if the flask before him was the one referred to in his answer and the one which he gave the Cumberland Glass Manufacturing Company and had received from the Mallard Distilling Company.

38 Q. Mr. Perry, did he admit anything to you of the knowledge of the contract from the Mallard Distilling Company?

A. Yes. He said he understood we had the contract.

Q. What knowledge did he say he had of the contract?

A. He said he had just gotten knowledge of it from his New York representative.

Q. In your conversation with Perry, when you visited him, did he say anything about having knowledge of this existing contract when he sent Frist to the Mallard Distilling Company?

A. He did not say he sent Frist. He said he knew I had this contract for 2,000 gross, but he presumed his New York man had stumbled into the order like any other order. I believed him.

Q. There was no denial of the knowledge that you had the contract?

A. Correct.

Q. You have spoken of the letter, if I understand you correctly, or letters, which Mr. Perry wrote, and which Mr. Frist brought and showed to you?

A. Which Mr. Frist mailed me, a letter from Perry.

Q. You read it?

A. Yes, sir.

Q. And you destroyed it?

A. Yes, sir.

Q. Can you give us the substance of that letter, what Perry said?

A. Yes——

(Mr. JACKSON:) We object. This is a very important letter. We have not been summoned to produce any copy of that letter.

(Mr. LAKE:) You had notice.

(Mr. DINNEEN:) What is the date of it?

The Court overruled the objection and the defendant therefore excepted. Whereupon the witness answered the question as follows:

39 A. That letter read as follows: "De Witt, Baltimore, mails us a Mallard Distilling Company flask. Go and take the business away from them. You have the price to do it. John F. Perry."

Therefore the defendant prays the Court to sign and seal this its Ninth Bill of Exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Tenth Bill of Exceptions.

After all the testimony taken in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Bills of Exceptions had all been offered as herein set forth, which said bills of exceptions are made a part hereof as fully as if herein incorporated in full, the plaintiff to sustain the issues joined on his part further testified on cross-examination that he could not remember the date of the latter, but could remember the exact wording of the letter, that he knew about the time, but, of course, not the date. That he got it about three years after the visit to Bridgeton.

Q. Do you mean to tell the jury that you can recall now the exact wording of a letter which you got in 1909, word for word, but you cannot recall the date of it so that we can locate a copy of that letter?

A. Absolutely. I think you will find the letter in about February 8 to 12, 1906. I think you ought to find it about then in the letter press books.

Q. You say it was about February 6th, 1906?

A. About February 12.

Q. But you did not get that letter until 1909?

A. That is right.

Witness further testified that when he went to Bridgeton in February, 1906, to see about the cancellation of the order, he did not know that the Cumberland Glass Manufacturing Company had the order for these goods.

Q. Did Mr. Perry tell you they had the order?
40 A. No.
Q. Did he deny it?
A. He was very non-committal. He said he knew nothing of it; he said if his man had gotten it, it was in the usual order of business, just like any other order.

The witness further testified that he met Mr. Shoemaker in Mallard's office in February, either February 9, 10 or 11, 1906, and accused him of stealing the business and he denied it. Mr. Frist was there, but he said nothing. Said he had to catch a train and hustled out.

Q. That is the man whom three years later you kicked out of your office?
A. I did not kick him out.
Q. Didn't you say that man came to your office and you kicked him out?
A. I did not say that. It is in the record.
Q. Did you say to Mr. Frist when he came to your office, "I don't want to talk to you?"
A. I did not kick him out; I told him I did not care whether it was true or not then.
Q. You did not care whether it was true or not?
A. Absolutely not.
Q. Therefore you did not care a rap about this thing until after you had the trouble with the Cumberland Glass Manufacturing Company about the bankruptcy proceedings?
A. That is not correct.
Q. When did you care?
A. The next day, when I consulted my attorney, then I hunted for the letter and I could not find it.
Q. You did not care a rap about this thing from 1906 to 1909 and not then until after you put Mr. Frist out of the office?
A. I was in total ignorance of it from 1906 to 1909.
Q. Why did you go to New York about it?
41 A. I could not get any information about it. I went to see why the order was cancelled.
Q. Why did you go to New Jersey?
A. Because I thought they filched the order.
Q. Did you think anybody else had filched the order that you got prices from?
A. No, sir; I didn't think they would do it.
Q. Who else did you get prices from?
A. J. T. Hamilton, Pittsburg; Sheffield Glass Works, and the Morris Glass Company.
Q. Now Mr. De Witt, when did that $790 note come due?
A. The note will have to speak for itself. The date is on it.

Q. Well, about when?

A. I don't remember now.

Q. Have you no recollection of when it comes due?

A. Yes; about a year before the institution of this suit. The note was due at about the time that Frist called on me, and then I decided to hold that money and not give it up, and I wrote and told them so.

Q. Now, the papers filed in this case state that at the time this thing happened, you accused the defendant of having caused the breaking of this contract; is that correct?

A. Yes.

Q. When you made this accusation, which was in February, 1906, what information did you have that caused you to make it?

A. The absence of any reply from the Cumberland Glass Manufacturing Company and the failure to return the flask. I tried to ascertain about that, but I did not succeed for three years.

Q. And you mean to tell this jury that although you made the charge in 1906, you went down and accused them right then and there, didn't you?

A. Absolutely.

Q. Of having interfered with this order?

42 A. Yes; absolutely.

Q. And the information you based that on was that they had your flask and had not given you any prices, is that it?

A. That is right.

Q. Was there any other information that you had?

A. Well, I was pretty sure that the price was low from MacLellan's remarks to me that they had received, and I knew it was an open and non-union factory at Minneola, New Jersey, and I knew that no one could give me a better price than he offered except a non-union factory—that is why I went. I was satisfied from Mr. Perry's conversation with me, though, that he told the truth. Then I was satisfied after Frist's letter that he did not tell the truth.

Q. You said that the Mallard people told you they could buy the goods for less money?

A. Seven or eight hundred dollars on the contract.

Q. And eight hundred dollars is the amount of profit you figured on?

A. Yes.

Q. When this note came due, you told the defendant in this case that you were not going to pay it. You had a claim against them for about the same amount, didn't you?

A. That is right.

Q. I hold in my hand the original petition filed by the Cumberland Glass Manufacturing Company, the Seneca Glass Manufacturing Company and the Monoga Glass Manufacturing Company, against Charles De Witt, asking for the adjudication of Charles De Witt as a bankrupt. Are you the Charles De Witt referred to in that petition?

A. Yes; what is the date of the petition, please?

Q. The petition itself does not seem to be dated. The affidavit is

made on the third of February, 1910, and it was filed on the 3rd of February, 1910?

A. Yes, I think I am the same man.

Q. You think you are?

A. I am not quite sure, I think I am still Charles De Witt
43 but I would not swear to it. I believe I am the same man. I am just fairly sure.

Q. Did you file any defense to that petition?

To which question the plaintiff by its counsel objected and the Court sustained the said objection to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its tenth bill of exception and is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Eleventh Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth bills of exceptions had all been offered as therein set forth which said bills of exceptions are hereby made a part hereof as fully as if herein incorporated in full, the plaintiff further to sustain the issues joined on his part being still on cross-examination further testified as follows:

Q. Now, Mr. De Witt, you filed a schedule in this case, did you not? Is this (indicating) your signature?

A. That is correct.

Q. Now, I have in my hand No. 2028, Bankruptcy Docket I, acceptances of proposed compromise by creditors, filed 23rd of March, 1910, in which there is a stack of acceptances of a composition of creditors. As a matter of fact were these acceptan-es by the creditors obtained by your efforts or not?

A. Yes.

Q. Did you ever try to reduce or make any effort to get the Cumberland Glass Manufacturing Company to accept their proportion too?

A. I think I did.

Q. Did they ever agree to it or not?

A. They never did.

44 Q. I want to show you, in connection with the schedules which you filed in the Bankruptcy Court, Schedule B., No. 3, choses in action, and ask you whether or not you failed to schedule this claim against the Cumberland Glass Manufacturing Company.

(WITNESS:) What is this page?

Q. That is called "Choses in Action." That means any claims or suits you have against anybody. There is a claim for $940.00 against the Cumberland Glass Manufacturing Company, or is this the suit against Williams for damages? This refers to your claim in the Mallard case or in some other matter, which?

A. That is the Mallard case.

(The COURT:) Then that claim against the Mallard Company was included in the list of assets?

(Mr. JACKSON:) Yes, sir.

Q. Now, Mr. De Witt, your offer under this composition of creditors were 20 cents on the dollar; wasn't it?

(Objected to.)

(Mr. JACKSON:) My position is to rebut the evidence and show what the real motive of delay in bringing this suit was. In other words, the best way to show that the motive was not what he says it is, is to show just what the real motive was.

I have not offered yet the certified copy of the docket entries from the Federal Court, which, under the statutes, is absolutely necessary. Now, I don't want the question to go off on a mere technicality and I have asked the clerk to prepare. I presume it will be ready shortly. Will your Honor permit me to file this later, nunc pro tunc?

(Mr. HAYES:) We will object on that point, but we do not waive any other right or objections we may have.

(Mr. JACKSON:) I offer in evidence now the account filed in this case under the composition, particularly in connection therewith claim No. 93.

(The COURT:) I will take it subject to exception.

(Mr. JACKSON:) I offer claim No. 93, about $790.03 composition dividend, $158.01.

45 (Mr. HAYES:) We object to that.

(The COURT:) I am letting it all go in subject to exception.

The defendant then offered in evidence a copy of the docket entries from the U. S. District Court of Maryland in the case of "In re Charles De Witt, Bankrupt," duly certified under the hand and seal of the Clerk of said Court, together with certain schedules of the assets of said bankrupt and his composition agreement with his creditors; and it is agreed that the clerk in making up the transcript of this record, instead of inserting the foregoing papers in extenso in the Eleventh Bill of Exception, incorporate therein the following, which are to have the same force and effect for the purpose of this appeal as would all of the foregoing exhibits, to wit:

Docket Entries In re Chas. De Witt, Bankrupt.

Feb. 3, 1910.—Petition of Cumberland Glass Manufacturing Company, a body corporate; Seneca Glass Company, a body, et al.; fd.

Feb. 3, 1910.—Order of Court requiring alleged bankrupt to show cause and subpœna issued.

Feb. 8, 1910.—Answer of Charles De Witt, individually and trading as Charles De Witt & Co., fd.

Feb. 8, 1910.—Adjudged bankrupt; order Court, fd.

Feb. 8, 1910.—Lewis W. Lake and G. Ridgely Sappington appointed recvrs.; bond, $12,000; order Court, fd.

Feb. 26, 1910.—Schedules of bankrupt fd.
Feb. 23, 1910.—Acceptance by creditors of composition agreement, fd.
April 8, 1910.—Composition agreement ratified; order Court fd.
April 23, 1910.—Referee's composition report and account, fd.
May 9, 1910.—Order Court finally ratifying Referee's report and account, fd.

That the composition agreement referred to in the foregoing docket entries so offered in evidence, showed that the claim of the Cumberland Glass Manufacturing Company against Charles
46 De Witt, bankrupt, was $790.03; that item No. 93 of said composition account so finally ratified allowed to said glass company in full of its said claim a dividend of 20 per cent., to wit, $158.01.

That among the scheduled assets returned by said De Witt, bankrupt, to the Federal Court was a claim for unliquidated damages, commissions and breach of contract, listed as a "chose in action," amounting to $940, which said bankrupt therein claimed to be due and owing his estate by the Cumberland Glass Manufacturing Company.

Assented to:—

L. W. LAKE, *For Pl'tff.*
HY. H. DINNEEN, *For Def'nd't.*

The witness further testified that he asked the Mallard people if they had gotten bids and they showed him prices from the North Wheeling Glass Works, of Wheeling, West Virginia, the C. L. Flaccus Glass Company of Pittsburgh, and said their prices were higher than everybody else; at Flaccus' the price was $2.55, the Wheeling Company, $2.85; witness' price was lowest.

Q. And yet they told you they bought the stuff for $2.00?

A. I didn't say that. I said they threw the contract because they said they could save seven or eight hundred dollars, and that they would give it to me.

Q. That means they bought at practically $2.00?

A. Yes.

Witness further testified that he got the information from Mr. Frist, telling him the real facts as he understood them in 1909. Could not recall the exact month, but it was somewhere in the neighborhood of April or May.

Q. Then you had all the information you could possibly get on the question?

47 A. Yes; I had enough, I thought.

Q. If that is the case, and you knew all about this thing in April or May, 1909, why did you delay until the 10th of August, 1910, or about fifteen months after that——

A. (Interrupting.) I thought it safer to get in their debt so I could hold them up.

Q. And in the meantime you bought stuff from them?

A. Some; yes.

Q. How much?

A. Oh, seven or eight hundred dollars.

Q. Seven or eight hundred dollars you bought after you had knowledge all about this thing?

A. I tried to get enough to cover my claim so they would have to sue me and put the burden of proof on them.

Q. And after that you got into bankruptcy and paid them 20 per cent. on the dollar?

A. I offered them an arrangement and they declined——

Q. So your purpose therefore, in buying these goods and getting this indebtedness of seven or eight hundred dollars, was to get a set-off against this claim?

A. I said I thought it was better that way.

Q. Wasn't that absolutely the purpose?

A. No, I said after that I owed them that much money, I deemed it prudent to hold on to it and——

Q. So you thought it was safer to get in our debt and you proceeded to do it?

A. So I said there, didn't I?

Q. So it wasn't a motive, but it was a question of safety?

A. You can say that.

Q. As a matter of fact, didn't you ask us for a year's extension on that note?

A. Pending the suit, yes, I believe I did.

Q. Do you mean to say that when you asked for that extension that you had no intention of paying that?

48 A. I did not say that.

Q. But your purpose was to hold us up?

A. At the time I owed the Cumberland Glass Manufacturing Company the amount of the note I was not in possession of the Frist information. When I got it I allowed the note to go to protest. I challenged them to fight me on it and they did not do it.

The witness then testified that he did not know the date of the note, that it was due months and months before the bankruptcy petition was filed against him.

Q. Now, Mr. De Witt, isn't the real reason why you delayed bringing this suit that you wanted to keep this bankruptcy matter off, wanted to keep out of the bankruptcy Court.

A. No, not at all. I had no idea of going into bankruptcy then, not the slightest.

Q. If that is the case, why is it that you wrote them a letter offering to pay them $100.00 to settle the controversy.

A. If that is the case, why didn't they take the $100.00? You said I knew the bankruptcy was pending?

Q. No, I didn't say that. I said, wasn't your *very* to induce the Cumberland Glass Manufacturing Company not to proceed on their note?

A. I think I testified that I held on to the $790.00 note to cover my $800.00 claim that I thought had been taken away from me.

Q. They, why did you offer to pay us $100.00? We owed you $10.00?

A. My note was $790.00 and my claim then was $940.00, and I

thought the easiest way would be if they paid me the profits I would pay that $100.00. I did not offer to pay them the $100 and the $700.00 note, not on your life. The note had to be receipted—it was an offset——

Q. Wasn't your claim on the Mallard claim $800.00?

A. Yes.

Q. Where did the $940.00 come from then?

A. There were a couple of orders they accepted and declined to fill.

49 Q. Didn't they decline to fill those orders because you did not pay your bill to them?

A. No.

(Mr. LAKE:) Part of that $940.00 note was demurred to and taken out of this case.

Q. Mr. De Witt, I want to show you this letter under date of May 14th, 1909, addressed to the Cumberland Glass Manufacturing Company, and ask you if that is a letter that you sent them?

A. This is my signature.

Letter dated May 14th, 1912, was then offered in evidence, reads as follows: Now, you put the matter in the hands of your attorney, and told him to go ahead; why was it you delayed from May, 1909, to August, 1910, before you actually did bring any suit, when you told him in May, 1909, you were actually going to proceed?

A. I did not proceed because they had not asked for the money. They knew they could not get it. They were so badly shown up, in my opinion.

Q. You think they were so badly shown up because you had the note of $790.00 and wouldn't pay it?

A. Yes, they had their money.

Q. And because they made no further claim on you, you did not bring any suit?

A. That is exactly correct.

Q. Why did you bring the suit in August, 1910, were they making any claim on you then?

A. To recover; what else? That is what the suit is for?

Q. Didn't you delay because you knew in the meantime your note in bankruptcy was cut out?

A. Absolutely not.

Q. Now, the very minute that claim was gotten out of the way that could have brought against you, you brought the suit, isn't that correct?

A. Do you think that is clever or not?

(Mr. JACKSON:) Yes, I think it is.

A. Well, then, I had nothing to do with that.

50 Q. It is a smart trick, I will admit, but——

A. (Interrupting.) I would like to get what they beat me out of.

Q. You said you did not bring the suit in 1909, because we did not push you on the promissory note?

A. Exactly.

Q. Then, why did you bring it in 1910, when we were not pushing you on anything?

A. The bankruptcy, in my opinion, defeated those people there. I believe they had to accept my proposition. That did not release them from the $800.00 they owed me, that they robbed me of three years before.

Q. And while that claim was a set-off——

(Mr. LAKE:) I object to that.

Q. Didn't you say yourself, Mr. De Witt, awhile ago, that you got into their debt so that you could set this off against this claim?

A. I did not. I said that at the time we owed that note, during the pendency, this man Frist, out of revenge, came and exposed the filthy trick, they played on me.

Q. Didn't you say awhile ago that you got into their debt so that you could set that off against this claim?

A. We owed them that money at the time of the Frist disclosure and we held on to it.

Q. Well, did you say that or not?

A. I did not.

(Mr. JACKSON:) Mr. Stenographer, just read that testimony for me. (The stenographer then read the testimony referred to.)

Q. All right, now, when you went down to Bridgeton, New Jersey, in 1906, you said that Mr. Perry had denied to you that they took the contract from you?

A. Yes, sir.

Q. What did Mr. Perry say, give us his language?

A. He denied having any knowledge of taking the order away from me, but said he knew we had this contract.

51 Q. I want to know exactly the words he used at the time?

A. My memory is absolutely clear, because it was Washington's Birthday. It was a Thursday. I was in New York and I went there to tell Mr. Perry, "We will try to tell the truth today, because it is Washington's Birthday." I said, "I came to see if you filched this order from me?" and he said, that he didn't know anything about it, that his man turned in the order, and that was all they knew. I said, "It is very singular, because you have not sent me the prices and you still have the flask I sent you." And Mr. Perry was very emphatic, and he convinced me that I was wrong, and we shook hands on it.

Q. What was his language?

A. His language was that the market was open, and they took business wherever they could get it, but they had nothing to do with interfering with my contract.

Q. Then you knew in February, 1906, that they had the contract?

A. I did not.

Q. Didn't you say he said so?

A. I did not.

Q. Did you say he said his man got the order in the ordinary way?

A. I said that he said his man had the right to get the order in the ordinary way.

The examination of the plaintiff being concluded at this point, whereupon the counsel for the plaintiff offered the flask in evidence and stated that he also wished to offer the Frist deposition. Whereupon counsel for the defendant stated that he would file objections to the deposition in proper form.

(The Court:) It is my understanding that it is rather late now for any exceptions.

(Mr. JACKSON:) Except for such as are apparent in the deposition.

— the proffer of the deposition of the witness Frist the defendant filed the following general exceptions and also filed at the same time thirty-six special and independent exceptions to certain questions and answers propounded to and given by the said witness Frist in the said deposition, which said thirty-six exceptions will hereafter more fully appear.

52 The defendant's general exceptions to the whole of the testimony of the witness Frist was in manner and form as follows:

The defendant excepted to the testimony of the witness Robert P. Frist, as a whole, taken by commission and filed in this case.

Because the issues in the case have been materially changed since said agreement was issued and testimony taken and returned to this Court.

The deposition of the witness Frist is as follows:

Notice for Taking Depositions of Non-resident Witnesses Before a Commissioner, Notary Public or Justice of the Peace under Section 16 of Article 35 of the Maryland Code of Public General Laws.

In the Superior Court of Baltimore City.

CHARLES DE WITT, Trading as Charles De Witt and Company,

vs.

THE CUMBERLAND GLASS M'F'G CO., Body Corporate, Incorporated under the Laws of the State of New Jersey.

To Paul M. Burnett, attorney for the Cumberland Glass M'f'g Co. in the above-entitled cause:

Notice is hereby given, under section 16 of Article 35 of the Maryland Code of Public General Laws, and Chapter 399 of the Laws of Maryland, passed at the January session, in the year 1898, that the deposition of the witness hereinafter named will be taken by the plaintiff before L. B. Binford, a notary public, located in the Central Building, Los Angeles, California, at his office at the above address on —— —, 1911, at — o'clock, — M., to be used in the above entitled cause.

Name of witness to be examined—Robert P. Frist.

LEWIS W. LAKE,
Attorney for Plaintiff.

53 Service of the above notice admitted this ninth day of March, A. D. 1911.

PAUL M. BURNETT,
Attorney for Defendant.

Instructions.

Except by agreement of parties, depositions can only be taken under this notice by the Commissioner of Deeds of the State of Maryland, Notary Public or Justice of the Peace, who is therein named, and at the time and place therein named, and of the witnesses therein named. Any party to the cause has the right to be present, either in person or by attorney, at the taking of the deposition, and the presence of said party should be noted by the Commissioner in his return.

It is competent for the parties to dispense with formal notice of time, place and name of the officer before whom the depositions are to be taken, and the attendance of the party against whom said depositions are taken, either in person or by agent, attorney or guardian, at the taking of the same, is deemed a waiver of the notice to such party to attend the taking thereof. Should it be found impracticable to complete the taking of the depositions at the time and place fixed by the notice, the taking of them may then and there be adjourned from time to time by consent of the parties present or represented, or at the discretion of the Commissioner.

The depositions may be taken either upon oral interrogatories and cross-interrogatories propounded by the parties or their attorneys, or by written interrogatories furnished the Commissioner. In the latter case the original interrogatories, so furnished should be annexed to the return, and the witness should be required to answer every interrogatory if only to say that he is ignorant of the matter inquired of, as an omission to answer any one question may exclude the whole deposition.

An oath or affirmation in the established form of the place to make true answers, to all such questions as shall be asked, without favor or affection to either party, and therein to speak the truth, the whole truth and nothing but the truth, must be administered to each witness before taking his deposition.

The depositions must be signed by the witnesses (unless their signatures shall be waived by consent of parties), and re-
54 turned to the Court in which the case is pending, in an envelope, sealed and directed to the judge thereof.

This notice, as well as all documents filed as exhibits, with any deposition, must be annexed to the return.

The official seal of a Commissioner of Deeds for the State of Maryland, or of a Notary Public is sufficient proof of his official character, but should the depositions be taken before a Justice of the Peace, there should be annexed a certificate of his official character under the seal of some Court of Record of the city or county in which the depositions are taken.

Interrogatories Propounded by Lewis W. Lake, Attorney for the Plaintiff, to be Used for Examination of Robert P. Frist.

1. State your name and address?
2. Were you ever employed by the Cumberland Glass Manufacturing Company of Bridgeton, New Jersey?
3. Will you state wheether or not you were employed by the Cumberland Glass Mfg. Co. *on* or about the month of February, 1906?
4. How long were you employed by this company?
5. In what capacity were you so employed by them?
6. How many years have you spent working in the glass business?
7. Will -ou state who it was that had the authority and acted in the capacity as sales manager for the Cumberland Glass Mfg. Co. about the time we are speaking, February, 1906?
8. During that time did you receive your instructions from the same source, and were you subservient to them?
9. Do you know Mr. John F. Perry?
10. Was he employed by the Cumberland Glass Mfg. Co. during the year 1906, in the month of February?
11. Will you state whether or not he had any authority over you, and had the proper right to instruct you as to your actions for the Cumberland Glass Mfg. Co.?
12. Do you know of the Mallard Distilling Company of New York City?

55 13. When was the first time you knew of them as purchasers of glassware, such as bottles, flasks, etc., in large quantities?

14. Will you state when it was that you first called upon the Mallard Distilling Company to solicit any business for the Cumberland Glass Mfg. Co. as their agent?
15. When you made this call upon them was it by your own act, or was it by the instructions of someone in authority for the Cumberland Glass Mfg. Co.?
16. Who was it that gave you the instructions to go to the Mallard Distilling Company?
17. Did you have any intention from any previous calls, or from any reason of your own, or as the agent of the Cumberland Glass Mfg. Co., of calling upon the Mallard Distilling Co. at the time you did, outside of the instructions you received from the Cumberland Glass Mfg. Co.?
18. Did you ever call upon the Mallard Distilling Company for the purpose of soliciting business for the Cumberland Glass Mfg. Co., or for any other person or company prior to Monday, February 12th, 1906?
19. When did you get the instructions from the Cumberland Glass Mfg. Co. to call upon the Mallard Distilling Co., and were you at the factory or away?
20. Who gave you these instructions?
21. Were you ever shown a sample flask, such as the Mallard Dis-

tilling Company use, with their name and address stamped in the glass, which I believe are called technically proprietary bottles, by Mr. John F. Perry, of the Cumberland Glass Mfg. Co., during the month of February, 1906?

22. Did he give you this flask with any instructions what to do?

23. Did Mr. John F. Perry, or any other person, on or about the 10th day of February, 1906, tell you that Charles De Witt & Co. of Baltimore, had a contract, or that a contract existed between the Mallard Distilling Co. and some other person, whereby the Mallard Distilling Co. was to purchase 2,000 gross of flasks like the sample shown you?

24. Did Mr. John F. Perry tell you that Charles De Witt & Company of Baltimore, Md., had inquired through their agent, Arthur McLellan, for prices on 2,000 gross of flasks such as he showed you?

56 25. Did he tell you then, or at any other time, that Charles De Witt & Company were the people who had the contract for the 2,000 gross?

26. Did you ever receive any instructions from the Cumberland Glass Mfg. Co. out of the ordinary as to securing this business, then under contract, personally?

27. Did you ever receive any letters from the Cumberland Glass Mfg. Co. while you were in New York City, confirming the instructions and urging you on, cause the Mallard Distilling Co. to break this contract and give you the contract for 2,000 gross of flasks for them?

28. Did the Cumberland Glass Mfg. Co. instruct you to make any offers or concessions, which were out of the ordinary, to induce the Mallard Distilling Co. to break this agreement?

29. Were these conditions against any of the rules of any associations to which the glass people belonged?

30. Did you, in pursuance of these instructions, cause or endeavor to cause, and use your efforts to make the Mallard Distilling Co. break their contract with Charles De Witt & Co.?

31. How many times, if you can remember, did you call on the Mallard Distilling Co. about this contract?

32. Can you remember whether or not on the 16th day of February, or thereabout, you received instructions from the Cumberland Glass Mfg. Co. to return to them the flask of the Mallard Distilling Company which they gave you?

33. Did anyone else ever help you to work for the Cumberland Glass Mfg. Co.? If so, who?

34. Do you know whether or not the Cumberland Glass Mfg. Co. succeeded in causing the Mallard Distilling Co. to break this contract?

35. From your experience, Mr. Frist, in the glass business, will you tell me whether or not you consider the conduct of the Cumberland Glass Mfg. Co. in the usual course of business?

36. Did you ever know, since your experience in business, of a case where a manufacturer did, deliberately, as the Cumberland Glass Mfg. Co., did, when a jobber like Charles De Witt & Co. sent them a

proprietary bottle asking for quotations, and revealing a contract in existence, endeavor to get the contract direct for themselves to the prejudice of the jobber?

57 37. From your experience, what is the custom when a manufacturer knows that a jobber who is dealing with them, has a contract?

Cross-interrogatories Propounded by Paul M. Burnett, Attorney for the Defendant, to be Used at the Examination of Robert P. Frist.

1. You have been questioned at some length concerning your knowledge of the existence of a contract between the Mallard Distilling Company and De Witt; how do you know there was such a contract?

2. Do you know the date of it?

3. Was it in writing?

4. As a matter of fact, was not your procedure in this case substantially this: A "tip" from your home office that the Mallard Company was in the field for such an order, that De Witt was figuring on it, and that if you acted quickly and figured closely you might land it?

5. In his thirtieth interrogatory, counsel for the plaintiff asked you whether you used your efforts to make the Mallard Distilling Company break an alleged contract with the plaintiff; kindly state fully and at large exactly what methods you used, what inducements you proffered and exactly what transpired at that time?

6. What, if any, was the difference in price between the figures which you, representing the Cumberland Glass Company, submitted to the Mallard Distilling Company, and those submitted by De Witt?

7. Besides price, deliveries and terms of payment, what other inducements customary to that trade did you embody in your offer to the Mallard Distilling Company?

8. What, if any, was the profit to the Cumberland Glass Company on its contract for the given number of bottles with the Mallard Distilling Company?

9. What was your personal commission in the transaction?

10. Were your instructions from the officers of the defendant company, your employers at that time, to get that contract

58 for the profit there was in the deal for the defendant, or for the purpose of hurting De Witt?

11. Neither you nor your employer, the Cumberland Glass Company, lost anything by that deal with the Mallard Company?

12. You were not instructed to deliberately undercut De Witt for the sole purpose of causing him to lose his commission, were you?

13. Had you, representing the Cumberland Company, any competitors for this Mallard business other than De Witt?

14. Are you or are you not on friendly terms, now, with the Cumberland Glass Company and its officers?

15. Do you know Chas. De Witt? If aye, state fully and at large what your relations have been and are?

Deposition of Robert P. Frist, Taken Before Me, L. B. Binford, Notary Public and Commissioner, under and by Virtue of the Annexed Commission, at 931 Central Building, City and County of Los Angeles, State of California.

ROBERT P. FRIST, witness of lawful age, produced on behalf of the plaintiff, being by me first sworn in due form of law, deposeth and says, as follows:

Answer to Interrogatory 1: R. P. Frist, 620 South Grand Ave., Los Angeles, California.

Ans. Int. 2: I was.

Ans. Int. 3: I was employed by them during February, 1906.

Ans. Int. 4: Nearly four years, within a few months of four years; about four years, we will say.

Ans. Int. 5: I had charge of their blowing machine department, and also worked as a salesman for the company.

Ans. Int. 6: To the best of my knowledge, about 16 years.

Ans. Int. 7: John F. Perry directed all the salesmen, and to the best of my knowledge he had charge of them during that time.

Ans. Int. 8: I was subservient to the orders of John F. Perry regards to selling ware; nothing else.

59 Ans. Int. 9: Yes, sir.

Ans. Int. 10: Yes, he was, and I believe he was a stockholder also in this company at that time.

Ans. Int. 11: He had a perfect right and authority to instruct what I should do while employed by the Cumberland Glass Company in regards to selling ware.

Ans. Int. 12: I know of the Mallard Distilling Company.

Ans. Int. 13: I think it was on a Saturday, the 10th of February, 1906, when Mr. Perry had a talk with me about the Mallard Company.

Ans. Int. 14: It was on Monday, the 12th of February, 1906.

Ans. Int. 15: It was the instructions of John F. Perry.

Ans. Int. 16: John F. Perry.

Ans. Int. 17: None whatever, as I did not know them prior to the time I spoke of, the Saturday before, as glass buyers.

Ans. Int. 18: No, I never did.

Ans. Int. 19: I received my instructions to go there from Mr. Perry during the talk *with* (we) had Saturday, February 10, 1906, when I returned from a trip to the factory at Bridgeton.

Ans. Int. 20: Mr. John F. Perry.

Ans. Int. 21: Yes, he showed me such a flask as you speak of the Saturday I speak of, when I returned to Bridgeton, February 10th, 1906. It had not the name of the Mallard Distilling Company blown in the bottle, but had a paper label pasted upon it describing that it had been filled at some time by the Mallard Distilling Company with gin.

Ans. Int. 22: He gave me the flask to take with me, telling me to get the business for the Cumberland Glass Company.

Ans. Int. 23: John Perry handed me this sample flask which had been sent by the Baltimore agent, Arthur MacLellan, as a sample that he had received from Charles De Witt and Company asking a price on 2,000 gross. John Perry did not say to me that the De Witt Company had a contract with the Mallard Distilling Company. I knew of no contract existing.

Ans. Int. 24: Yes.

60 Ans. Int. 25: He did not.

Ans. Int. 26: Mr. Perry asked me to work very hard to get this order, and if possible to secure it, using a lower price than he thought De Witt would be able to quote and make a profit.

Ans. Int. 27: I received several letters from Mr. Perry during the two weeks I was working on this order asking me to use every possible effort to get it, but he never mentioned in his letter that De Witt had a contract.

Ans. Int. 28: Only in prices.

Ans. Int. 29: Not being a member of the Glass Manufacturers' Association, I wouldn't state.

Ans. Int. 30: I suppose six times.

Ans. Int. 31: I suppose six different times.

Ans. Int. 32: I can't state positively whether it was on the 16th of February, 1906, but I did receive a letter directing me to send back by mail the sample flask, which would reach them before I would, at the end of the week, as I always went home on Saturday, to Bridgeton.

Ans. Int. 33: Yes, Mr. R. E. Shoemaker went to the Mallard office on my last visit there, with me. He made extra concessions to the manager, who, I think, name was Cohn, offering extra inducements to get the order by making concessions in prices of cullet, also making allowances for empty crates and hauling the same free of charge to the wharf.

Ans. Int. 34: I do not, as it was left in the hands of R. F. Shoemaker.

Ans. Int. 35: I certainly do not and in the phrase that would be used between one glass man to another, it would be designated as "very dirty business."

Ans. Int. 36: No, sir, I have not in my business experience.

Ans. Int. 37: It is to protect his contract and keep their hands off and not meddle with the customers' business.

Cross-examination:

Ans. X Int. 1: I didn't know there was a contract.

Ans. X Int. 2: No, sir.

Ans. X Int. 3: I never saw it.

61 Ans. X Int. 4: I got my instructions from John F. Perry, to get the order if possible with a low price.

Ans. X Int. 5: I used every effort I knew as a salesman to procure the order for the Cumberland Glass Company with the inducement of price and superiority of ware and being able to deliver the goods on time.

Ans. X Int. 6: I cannot recollect the price, as it has been so long ago.

Ans. X Int. 7: I made no such terms to the Mallard Distilling Company. Mr. R. E. Shoemaker was the gentleman who took charge of that part of it.

Ans. X Int. 8: Not being able to recollect the selling price, I couldn't say what it might be.

Ans. X Int. 9: Salary.

Ans. X Int. 10: My instruction was to get the business.

Ans. X Int. 11: I lost my position after selling $185,000 worth of ware for them in five months. I was sacrificed and made the goat so that the Cumberland Glass Company might appease De Witt and keep his business. I don't know that the Cumberland Glass Company lost anything, nor I in self-respect by severing my connection with the company.

Ans. X Int. 12: I did not know De Witt's prices.

Ans. X Int. 13: Not that I know, sir.

Ans. X Int. 14: For all I know, I am on friendly terms with them.

Ans. X Int. 15: I have known Charles De Witt for the past ten years as a glass jobber and done business with him. Always found him to be an honest, upright man in every respect. I am not doing any business with him *now* and haven't for five years.

ROBERT P. FRIST.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, L. B. Binford, Notary Public and Commissioner in the foregoing commission named, do hereby certify that I caused
62 the witness therein named, Robert P. Frist, to appear before me on the 21st day of March, 1911, at my office, Room 931 Central Building, Los Angeles, California, and that after being duly sworn, his evidence was taken down in short-hand by Miss Florence Ely, a disinterested party, and by her reduced to typewriting, and that the same was then read over and corrected by him, after which he subscribed the same in my presence on the 21st day of March, 1911, at my office.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first aforesaid.

[SEAL.]

L. B. BINFORD,
Notary Public and Commissioner.

But the Court overruled the general exception of the defendant to the said deposition and permitted the said deposition to be offered in evidence to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its Eleventh Bill of Exception which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twelfth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh bills of exceptions had all been offered in evidence as therein set forth all of which exceptions are hereby make a part hereof as fully as if herein incorporated in full the plaintiff further to sustain the issues joined on his part, made a proffer of the deposition of the witness Frist as set forth in the eleventh bill of exceptions. Whereupon the defendant excepted to the seventh interrogatory on direct examination in said deposition,

1. Because there is no proper foundation laid for this question.
2. Because the witness has not qualified to answer the said question.

63 But the Court overruled said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its twelfth bill of exceptions which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirteenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eight-, ninth, tenth, eleventh and twelfth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant then filed the following exceptions to the answer of the witness to the seventh interrogatory on direct examination and moved that it be stricken out.

1. Because it appears from the said answer that the witness has no knowledge of the facts hereof.

2. Because the answer of the witness is an expression of opinion only and does not give any facts on which the opinion is based.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirteenth bill of exceptions which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Fourteenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth bills of exceptions had all been offered as therein set

64 forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff

further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant then filed the following exception to the answer of the witness to the eleventh interrogatory on direct examination:

1. Because the question asks an opinion of the witness and a deduction therefrom without giving the facts.

But the Court overruled the said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this, its fourteenth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Fifteenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepts to the answer of the witness to the eleventh interrogatory on direct examination:

1. Because said answer is an expression merely of an opinion by the witness and does not give any facts on which said opinion is based.

2. Because said answer is not responsive to the question.

But the Court overruled the said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this, its fifteenth bill of exception which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

65 *Defendant's Sixteenth Bill of Exception.*

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepts to the fourteenth direct interrogatory:

1. Because it assumed that the witness visited the Mallard Distilling Company as the agent of this defendant and of this there is no proof.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its sixteenth bill of exceptions, which is

accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Seventeenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant then excepted to the witness' answer to the fifteenth direct interrogatory:

1. Because the answer is not responsive to the question;

2. Because there is no authority shown in John F. Perry to bind this defendant.

But the Court overruled the said exceptions, to which action of the Court the defendant then and there excepted and prays
66 the Court to sign and seal this its seventeenth bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Eighteenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the sixteenth direct interrogatory and the answer of the witness thereto:

1. Because it in nowise appears that John F. Perry had any authority to act as agent for or to bind this defendant.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its eighteenth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Nineteenth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth bills of exceptions had all been offered as therein set forth, all of

which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the seventeenth direct interrogatory:

67 1. Because it calls for an opinion from the witness and not from any facts within the knowledge of the witness;

2. Because it assumes that the witness had received instructions to call upon the Mallard Distilling Company from this defendant.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its nineteenth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twentieth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighte-nth and nineteenth bills of exception had all been offered as there set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the nineteenth interrogatory:

1. Because it assumed that the witness received instructions from the Cumberland Glass & Manufacturing Company, the defendant, of which there is no proof.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this, its twentieth bill of exception, which is accordingly done this 28th day of December, ninete-n hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-first Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth,
68 thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepts to the witness' answer to the nineteenth direct interrogatory and moves that the same be stricken out:

1. Because the answer shows that the instructions of the witness were received from a certain Mr. Perry, and there is no proof that

Mr. Perry was then an agent of this defendant nor the extent of this authority if there was such an agency.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its twenty-first bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-second Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first bills of exception had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the twentieth direct interrogatory:

1. Because there is nothing in the answer to bind this defendant;

2. Because there is no evidence to show that at that date John F. Perry was an agent of this defendant nor is there any evidence to show if he was the extent and authority of his agency.

69 But the Court overruled the said exception, to which action of the Court the defendant then and there excepted, and prays the Court to sign and seal this its twenty-second bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-third Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the twenty-first direct interrogatory:

1. Because the question is immaterial to the issues raised in this case.

2. Because it assumes that John F. Perry was acting for and on behalf of this defendant as its agent and there is no proof of said agency nor if it existed of the extent thereof.

But the Court overruled the said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its twenty-third bill of exceptions which

is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-fourth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth,
70 thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the twenty-first direct interrogatory:

1. Because it affirmatively appears from the said answer that the flask shown to the witness was not the flask offered in evidence in this case.

2. Because there is nothing in the answer of the witness nor in the testimony sufficient to bind the defendant by the action of John F. Perry as described in said answer.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this, its twenty-fourth bill of exception which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-fifth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the twenty-second direct interrogatory:

1. Because it assumes that the said John F. Perry was acting as the agent of this defendant and there is no proof that at that time the said John F. Perry was the agent of this defendant or that if he was, the nature of his agency.

71 But the Court overruled the said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this, its twenty-fifth bill of exception which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-sixth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth bills of exceptions had all been offered as therein set forth, all of which exceptions are thereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the answer of the wi-ness' twenty-second direct interrogatory; and moves that it be stricken out:

1. Because it assumes that a certain John F. Perry was then and there acting as the agent of this defendant and there is no proof of such agency or if it existed the extent and nature thereof.

2. It attempts to bind this defendant by a conversation held between a certain John F. Perry and the witness and for the reason first above set out this defendant is not bound by the conversation of the said Perry.

3. Because it gives a part of the conversation without giving all of it.

But the Court overruled the said exception to which action of the Court, the defendant then and there excepted and prays the Court to sign and seal this, its twenty-sixth bill of exception which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

72 *Defendant's Twenty-seventh Bill of Exception.*

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the twenty-third direct interrogatory:

1. Because the sample shown the witness is not offered in the evidence in this cause.

2. Because the sample shown the witness, it affirmatively appears from his testimony, was not the flask offered in evidence in this cause.

3. Because the question assumes that John F. Perry was acting as the agent of this defendant and there is no proof of such agency nor the extent thereof.

But the Court overruled the said exception, to which action of

the Court the defendant then and there excepted and prays the Court to sign and seal this its Twenty-seventh Bill of Exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Twenty-eighth Bill of Exception.

After the foregoing testimony taken in the preceding Bills of Exception had all been offered as herein set out, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues on his part made a proffer of the answer of the witness Frist to the 23rd interrogatory, contained in said deposition, whereupon the defendant moved the Court not to receive and to strike out the
73 whole of said answer to said twenty-third interrogatory; but the Court refused to strike out of said answer the last two sentences thereof, beginning with the words "John Perry did not say" and thence to the end thereof, to which action of the Court in refusing to strike out said part of said answer, the defendant then and there excepted and prays the Court to sign and seal this its Twenty-eighth Bill of Exception, which is accordingly done this 28th December, 1912.

JAMES M. AMBLER.

Defendant's Twenty-ninth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twen-y-sixth, twenty-seventh, twenty-eighth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the twenty-fourth direct interrogatory:

1. Because the facts attempted to be elicited by the said question are immaterial to the issues raised in this case.

2. Because the flask shown the witness has not been offered in evidence in this case.

3. Because it affirmatively appears from the witness' testimony that the flask shown the witness was not the flask offered in evidence in this case.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its Twenty-ninth Bill of Exception, which is accordingly done this 28th day of December, nineteenth hundred and twelve.

JAMES M. AMBLER.

74 *Defendant's Thirtieth Bill of Exception.*

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, — twenty-ninth bills of exceptions had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if incorporated in full, and the plaintiff having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the twenty-sixth interrogatory and moves that the same be stricken out:

1. Because the answer assumes that a certain John F. Perry was the agent of the defendant and there is no proof of such agency nor if such agency existed of the extent thereof.

But the Court refused to strike out the said answer, but struck out a part of the same beginning with the words "using a lower price" and from there on to the end of the said answer.

To which action of the Court in refusing to strike out the entire answer, the defendant then and there excepted and prays the Court to sign and seal this its Thirtieth Bill of Exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-first Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth bills of exceptions had all been offered as herein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having
75 made a proffer of the deposition of the witness Frist, the defendant excepts to the twenty-seventh direct interrogatory:

1. Because there is no evidence that the witness was urged to cause the Mallard Distilling Company to break this contract as it affirmatively appears from the testimony of the witness that he had no knowledge of the existence of such a contract.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-first bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-second Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, — eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth and thirty-first bill of exceptions had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the twenty-seventh direct interrogatory; and moves to srike it out:

1. Because it assumes that Mr. Perry was acting as the agent of this defendant, and there is no proof of such agency, nor, if it existed, of the extent thereof;

2. Nor does said answer contain any facts relevant to the issues raised in this case.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-second bill of exceptions, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

76 *Defendant's Thirty-third Bill of Exception.*

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first and thirty-second bills of exceptions had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the twenty-eighth direct interrogatory:

1. Because it affirmatively appears that the witness had no knowledge of any contract between the Mallard Distilling Company and the plaintiff.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prayed the Court to sign and seal this its thirty-third bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-fourth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second and thirty-third bills of exception had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the thirtieth direct interrogatory:

77 1. Because it affirmatively appears from the testimony of the witness that he had no knowledge of any contract between the Mallard Distilling Company and the plaintiff.

2. Because it assumes that the witness had instructed the Mallard Distilling Company to break the said contract of which the witness had no knowledge.

This exception the Court sustained, whereupon the defendant excepted to the thirty-first direct interrogatory:

1. Because it affirmatively appears from the testimony of the witness that he had no knowledge of the contract referred to in the said question.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-fourth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-fifth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third and thirty-fourth bills of exception had all been offered in evidence as herein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the thirty-second direct interrogatory:

1. Because the flask mentioned in said interrogatory is not offered in evidence in this cause.

78 2. Because it affirmatively appears from the testimony of this witness that the flask offered in evidence is not the flask mentioned in said interrogatory.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-fifth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-sixth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth and thirty-fifth bills of exceptions had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the thirty-second direct interrogatory, and moves to strike it out:

1. Because the flask mentioned in said answer is not offered in evidence in this cause.

2. Because it affirmatively appears from the testimony of this witness that the flask offered in evidence in this cause is not the flask referred to in said answer.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-sixth bill of exception, which is accordingly done this 28th December, nineteen hundred and twelve.

JAMES M. AMBLER.

79 *Defendant's Thirty-seventh Bill of Exception.*

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth bills of exception had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof, as fully as if incorporated in full, and the plaintiff further to sustain the issues joined on his part having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the thirty-third direct interrogatory, and moves to strike it out:

1. Because the said answer assumes that a certain R. E. Shoe-

maker was then and there acting as an agent of this defendant and there is no proof of such agency nor if it existed of the extent thereof.

2. Because the answer of the witness purports to show a conversation between a certain Cohen and a certain Shoemaker and the witness and there is nothing to show that this defendant is in any way bound by or a party to or had any knowledge of said conversation.

But the Court overruled the said exception to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-seventh bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-eighth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh bills of exception had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the thirty-fourth direct interrogatory:

1. Because it affirmatively appears that the witness had no knowledge of any contract between the Mallard Distilling Company and the plaintiff herein.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its thirty-eighth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Thirty-ninth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, and thirty-eighth bills of exception had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to

sustain the issues joined on his part, having made a proffer of the deposition of the witness Frist, the defendant excepted to the witness' answer to the thirty-fourth direct interrogatory, and moves to strike it out:

1. Because there is no proof to show that the said R. E. Shoemaker was the agent of the defendant nor if such agency existed, the extent of his agency.

81 To which exception the Court overruled in part and granted in part by striking out that part of the answer beginning with the words "as it was let." All the answer prior to said words being left in the record. To which action of the Court in failing to strike out the entire answer and in leaving a certain part as above set forth in the record, the defendant by its counsel then and there excepted, and prays the Court to sign and seal this its thirty-ninth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Fortieth Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, and thirty-ninth bills of exceptions had all been offered in evidence as therein set forth, all of which exceptions are hereby made a part hereof as fully as if herein incorporated in full, and the plaintiff, further to sustain the issues joined on his part, having made a proffer of the deposition of witness Frist, the defendant excepted to the thirty-fifth direct interrogatory:

1. Because it asks for an opinion from the witness without first qualifying him;

2. Because it affirmatively appears that the witness is an ordinary traveling salesman and has had no experience in the glass business.

To which exception the Court sustained and thereupon the defendant excepted to the witness' answer to the thirty-fifth direct interrogatory, and moves to strike it out:

1. Because the witness is not qualified to express any opinion as asked for by the interrogatory;

2. Because it affirmatively appears from the witness' own testimony that he was not qualified to express such an opinion as was demanded by the said interrogatory.

82 Which exception the Court also sustained and the defendant excepted to the thirty-sixth direct interrogatory:

1. Because the witness was not qualified to express an opinion as was demanded by the said question;

2. Because it affirmatively appears from the testimony of this

witness that he had no knowledge of any contract between Charles De Witt & Company and the plaintiff herein;

3. Because it affirmatively appears that the bottle which Charles De Witt sent to this defendant and offered in evidence was never shown to the witness and never sent by him;

4. Because it affirmatively appears from the testimony of this witness that the flask which he saw has not been offered in evidence in this case;

5. Because it affirmatively appears from the testimony of this witness that the flask referred to in the said interrogatory was not the flask offered in evidence in this case.

6. Because the question assumes, but gives no facts on which the witness can base his opinion, that the Cumberland Glass Company endeavored to get a contract for themselves to the prejudice of De Witt & Company.

Which exception the Court also sustained, and the defendant excepted to the witness' answer to the thirty-sixth interrogatory, and moves that it be stricken out:

1. Because the witness has not qualified to express such an opinion as is demanded by the said interrogatory.

Which exception the Court also sustained and the defendant excepted to the thirty-seventh direct interrogatory:

1. Because the witness has not qualified to answer the question;

2. Because it assumes the existence of a custom and there is no proof of the existence of such.

Which exception the Court also sustained and the defendant excepted to the thirty-seventh interrogatory, and moves to strike it out:

1. Because the witness has not qualified to answer the question;

83 2. Because it affirmatively appears from the witness' own testimony that he had no knowledge of any contract between the Mallard Distilling Company and the plaintiff.

Which exception the Court sustained, whereupon the defendant excepted to the witness' answer to the fourth cross-interrogatory, and moves to strike it out:

1. Because the answer is not responsive to the question;

2. Because it assumes that John F. Perry was the agent of this defendant and there is no proof of such agency, nor if it existed of the extent thereof.

But the Court overruled the said exception, to which action of the Court the defendant then and there excepted and prays the Court to sign and seal this its fortieth bill of exception, which is accordingly done this 28th day of December, nineteen hundred and twelve.

JAMES M. AMBLER.

Defendant's Forty-first Bill of Exception.

After all the testimony taken in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thir-

teenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth and fortieth bills of exceptions had all been offered as therein set forth, all of which exceptions are hereby made a part hereof as fully as if incorporated in full, the plaintiff then read to the jury in evidence such parts of the deposition of the witness Robert P. Frist as had been admitted in evidence.

During the reading of the deposition to the jury the Court of its own motion ordered the fifth cross-question stricken from the record, because it referred directly to the thirtieth direct question.

84 And further to sustain the issues joined on his part the plaintiff then offered in evidence the deposition of a certain CHARLES M. KOHN, taken by the defendants in this case, which said deposition was then read to the jury.

It is as follows:

STATE, COUNTY AND CITY OF NEW YORK, *ss:*

Be it Remembered and I Hereby Certify, That on this 26th day of April, 1912, I, Richard Condon, a Notary Public of the State of New York, in and for the County and City aforesaid, by virtue of the attached Commission to me issued out of the Superior Court of Baltimore City, in the cause of Charles De Witt & Company against the Cumberland Glass Manufacturing Company, wherein I am named as Commissioner to take testimony, did attend at the office of the Amplex Motor Car Company, 1794 Broadway, in the State, County and City aforesaid, and did, then and there, under and by virtue of the power in said Commission contained and in pursuance of the provisions thereof, take the deposition of Charles M. Kohn, a witness produced on behalf of the defendant in said cause, as designated in the attached Commission.

The testimony following was taken in the presence of Messrs. Lewis W. Lake, representing the plaintiff, and H. H. Dinneen, representing the defendant in the above cause of De Witt vs. Cumberland Glass Manufacturing Company, who mutually agreed to waive the signature of said witness Kohn to the within depositions so taken by me as Commissioner.

After having first administered the oath following to said Charles M. Kohn, to wit: "In the presence of Almighty God, you do solemnly promise and declare that the answers which you will give to the questions now to be propounded will be the truth, the whole truth, and nothing but the truth, and that the interrogatories propounded you will be by you answered without favor to either party to this cause," I then and there propounded the questions following to said Cohn, to which said witness made the answer hereinafter immediately set out in full immediately following the respective question:

Direct examination.

(By Mr. DINNEEN:)

Q. Please state your full name, address and occupation?

85 A. 1. Charles M. Kohn, 1749 Broadway, New York City; I am a merchant.

Q. 2. Were you ever connected with the Mallard Distilling Company? If so, during what years and what position, if any, did you fill with that company?

A. 2. Yes; from 19-2 to 19-9 I was the secretary, treasurer and manager of the Mallard Distilling Company.

Q. 3. During that period did you know, or have any dealings with Charles De Witt & Co.?

A. 3. Yes.

Q. 4. Charles De Witt & Company have sued the Cumberland Glass Manufacturing Company for damages for the alleged wrongful act of the Cumberland Company in causing the Mallard Distilling Company to break a contract for the purchase of 3,000 gross of bottles, which Charles De Witt & Company had with it, said Mallard Company, in February, 1906; what, if anything, do you know about said contract, if any; whether or not the same was broken, and what connection, if any, the Cumberland Glass Company had with the transaction?

A. 4. There was such a contract, and it was broken by me. They (the Cumberland Glass Mfg. Co.) caused me to break it by giving me sufficient inducements to break it—that is, as to price, taking back empty crates, broken glass and a guarantee against a certain amount of breakage.

Q. 5. Do you know whether what the Cumberland Glass Company did with reference to the subject mentioned in the preceding question was done maliciously and with intent to injure Charles De Witt & Company?

(Objected to by Mr. Lake.)

A. 5. I don't know.

Q. 6. State what, if any, conversations or agreements or arrangements you had with Charles De Witt in the year 1906 concerning the above contract which he says the Cumberland Glass Company caused the Mallard Company to break?

A. 6. The only conversation I remember is that De Witt asked me, a short time after the contract was broken, why I broke the contract with him, and I refused to tell him why.

Q. 7. What did De Witt say when you told him that you had broken the contract?

86 A. 7. He surprised me at that time by having very little to say about it.

Q. 8. When did De Witt, to your knowledge, first learn that the Cumberland Glass Company had gotten the order from you which you had given him in February, 1906, for 2,000 gross bottles?

(Objected to by Mr. Lake.)

A. 8. Within a short time; less than a year from the time the contract was broken by me.

Cross-examination:

Q. 1. You don't mean to say, Mr. Kohn, that De Witt at any time told you that you could break your contract with him for 2,000 gross bottles?

A. 1. No.

Q. 2. Did you break the contract with De Witt because of the Cumberland Glass Manufacturing Company's interference?

A. 2. Yes.

Q. 3. Did the Cumberland Glass Manufacturing Company ever call on you prior to the date you contracted with De Witt for 2,000 gross bottles for the purpose of soliciting orders?

A. 3. No, I never heard of them before then.

(Signature waived by agreement.)

There being no further questions to be propounded, I thereupon closed said testimony and commission, which is herewith returned, closed under my hand and seal, to the Superior Court of Baltimore City, in the Eighth Judicial Circuit of Maryland.

[SEAL.] RICHARD CONDON,
Notary Public and Commissioner to Take Testimony.

After the reading of the said deposition the plaintiff announced the close of his case, whereupon the defendant to sustain the issues joined on its part produced as a witness a certain LEWIS W.
87 LAKE who having been duly sworn testified as follows:

Q. Will you look at these two letters (indicating) and state whether or not the signature- attached thereto are your signatures?

A. They are my signatures.

The said letters were then offered in evidence and read as follows:

DEFENDANT'S EXHIBIT No. 2.

Lewis W. Lake, Attorney at Law, 104 E. Lexington St., Baltimore, Md.

May 17th, 1909.

Cumberland Glass Mfg. Co., Bridgeton, N. J.

GENTLEMEN: I have had placed in my hands by Mr. Charles De Witt of Charles De Witt and Company of this city a claim against the Cumberland Glass Manufacturing Company of Bridgeton, N. J., amounting to $944.17, which is $154.14 over and above the amount and the interest on the note you hold against Chas. DeWitt & Co. for $790.03 due last May the 8th, 1909.

I do not consider it necessary, from the correspondence turned over to me by Mr. De Witt, to give you any further information concerning the same, as your letters to him show you to be familiar

with it. I shall therefore ask you to return me the note you now hold and your check for $154.14; otherwise, I will enter suit against you for the same through your representative for Maryland, Mr. MacLellan.

Kindly let me hear from you at once your attitude in the premises, and oblige,

Yours truly,

L. W. LAKE.

88 DEFENDANT'S EXHIBIT No. 3.

Lewis W. Lake, Attorney at Law, Baltimore, Md.

Dec. 2, 1909.

Cumberland Glass Mfg. Co., Bridgeton, N. J.

GENTLEMEN: (Pencil Note:) Don't write; Mr. R. E. S. attending. CWS—11/6/09.

I have before me your communication of the 30th of Nov. of this year and in answer will say, that taking thing in to due consideration we believe that both in law and equity that the Cumberland Glass Mfg. Co. is indebted to Chas. De Witt & Co. to the extent of $800 in the Mallard matter and $144 in the breach of contract case, this righteously speaking leaves owing De Witt over and above the amount of the note $146.14 and we believe that undoubtedly we could recover if we wished to go to the disagreeable task of a suit, and which I am perfectly frank in saying that we would never bring.

Now you ask me to make you an offer of settlement to bring our several differences to a head. In this I can only say that he will make an offer to effect a settlement rather than to be brought into Court if it can be done at once, and I will say personally I am advising Mr. De Witt to bring suit against you. I am instructed through my client to say that he will be willing to give and pay over to your firm $100.00 to close the matter, and in so doing I cannot help but think he is acting very liberally.

Trusting that this will be received satisfactory with you and your company and awaiting your early reply,

I remain yours truly,

L. W. LAKE.

89 On cross-examination the said witness testified that the offer referred to in the said letters was not accepted by the defendant.

Q. Was it formally declined or was nothing done in response to this?

A. I don't think there was anything done in response to that, if I remember correctly. There was considerable correspondence between the Cumberland Glass Manufacturing Company and myself, but I know the compromise never was accepted, and I am not positive whether I received an answer to that letter or not.

At the close of this testimony the defendant announced the close of its case, and there being no testimony in rebuttal, the plaintiff and defendant then offered the following several prayers and special exceptions:

Plaintiff's First Prayer.

The plaintiff prays the Court to instruct the jury, that if they find from the evidence, that in the month of February, 1906, the plaintiff had entered into contracts with the Mallard Distilling Company to supply it with 2,000 gross of glass flasks at $2.40 per gross, if they so find. And further find that the plaintiff was at all times able and ready to comply with said contracts, and furnish said flasks to the Mallard Distilling Company in accordance with said contracts, if they so find. And further find that before the time of delivery of said flasks by the plaintiff to the Mallard Distilling Company under said contracts, that the defendant or its agents obtained information of said contracts, if they so find, and the defendant with full knowledge of said contracts, dispatched one of its salesmen to the Mallard Distilling Company with instructions to said salesman to get the order of the Mallard Distilling Co. for said flasks, if they so find, and did procure and induce the Mallard Distilling Co. to break said contracts it had with the plaintiff for the said 2,000 gross of flasks, for the purpose of benefiting itself or injuring the plaintiff, if they so find; then the verdict of the jury should be for the plaintiff; provided the jury further find, that the plaintiff was kept in ignorance of the cause of action for which this suit is brought by the fraud of the defendant, if they so find, which fraud was not discovered and could not have been discovered by the plaintiff by usual and ordinary diligence, until the year 1909.

(Granted.)

90 *Plaintiff's Second Prayer.*

The plaintiff prays the Court to instruct the jury that if they find for the plaintiff that the damages the plaintiff is entitled to recover is the difference between the cost to the plaintiff of the flasks embraced in the contracts, which the jury may find the contracts in question required the plaintiff to furnish the Mallard Distilling Company at the time of delivery of same, and the price of said flasks embraced in the said contracts, which was stipulated in said contracts to be paid the plaintiff for the 2,000 gross of said flasks by the Mallard Distilling Company.

(Granted.)

Defendant's First Prayer.

The jury are instructed that there is no evidence legally sufficient to entitle the plaintiff to recover in this cause and therefore the verdict of the jury must be for the defendant.

(Refused.)

Defendant's Second Prayer.

The jury are instructed that under the pleadings there is no evidence legally sufficient to entitle the plaintiff to recover and therefore the verdict of the jury must be for the defendant.
(Refused.)

Defendant's Third Prayer.

The jury are instructed: There is no evidence legally sufficient to establish the allegations contained in the plaintiff's amended replication to the defendant's second plea, and therefore the verdict of the jury must be for the defendant.
(Refused.)

91 *Defendant's Fourth Prayer.*

The jury are instructed that under the pleadings there is no evidence legally sufficient to establish the allegations of the plaintiff's amended replication to the defendant's second plea, and therefore the verdict of the jury must be for the defendant.
(Refused.)

Defendant's Fifth Prayer.

The jury are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of proof satisfactory to them, the truth of the following allegations, alleged in the plaintiff's amended replication to the defendant's second plea, to wit: "The defendant, did fraudulently keep the plaintiff in ignorance of said cause of action by fraudulently, deceitfully and dishonestly denying that it had in any way been guilty of any of the acts alleged in the amended narr." "and the said facts did not come to the knowledge of the plaintiff" until less than three years before the institution of this suit, though "he had used ordinary diligence to discover the same," and if the testimony in this case does not satisfy the jury as to the truth of the said allegations the verdict must be for the defendant.
(Granted.)

Defendant's Sixth Prayer.

The jury are instructed that under the pleadings if they find that the plaintiff failed to bring this suit within three years from the time his right of action accrued and shall further find that his failure to bring said suit was not due to any dishonest or fraudulent concealment by the defendant of the existence of such right of action then their verdict must be for the defendant.
(Granted.)

92 *Defendant's Special Exception.*

The defendant excepts to the plaintiff's first prayer, because there is no evidence legally sufficient to sustain the following allegations thereof, to wit:

1. "And further find that the plaintiff was at all times able and ready to comply with said contracts, and furnish said flasks to the Mallard Distilling Company in accordance with said contracts."

2. "And further find that before the time of delivery of said flasks by the plaintiff to the Mallard Distilling Company, under said contracts, that the defendant or its agents obtained information of said contracts, if they so find, and the defendant with full knowledge of said contracts, dispatched one of its salesmen to the Mallard Distilling Company with instructions to said salesman to get the order of the Mallard Distilling Company for said flasks."

3. "Did procure and induce the Mallard Distilling Company to break said contracts it had with the plaintiff for the said 2,000 gross of flasks."

4. "For the purpose of benefiting itself or injuring the plaintiff."

5. "That the plaintiff was kept in ignorance of the cause of action for which this suit is brought by the fraud of the defendant."

6. "Which fraud was not discovered and could not have been discovered by the plaintiff by usual and ordinary diligence, until the year of 1909."

(Overruled.)

But the Court granted the plaintiff's first and second prayers and the defendant's fifth and sixth prayers and rejected the defendant's first, second, third and fourth prayers and also overruled the defendant's special exception to the plaintiff's first prayer. To which action of the Court in granting the defendant's first and second prayers and in rejecting the defendant's first, second, third and fourth prayers and in overruling the defendant's special ex-

93 ception to the plaintiff's first prayer the defendant then and there excepted and prays the Court to sign and seal this, its forty-first bill of exception which is accordingly done this 28th day of De-ember, nineteen hundred and twelve.

JAMES M. AMBLER.

We assent to the signing of the foregoing bills of exceptions.

LEWIS W. LAKE,
For Plaintiff.
HENRY H. DINNEEN,
For Defendant.

Dec. 28th, 1912.

Appellant's costs, $81.25.
Appellee's costs, $14.30.

STATE OF MARYLAND,
City of Baltimore, sct:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Superior Court in the therein entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the Superior Court of Baltimore City, this 6th day of January, in the year one thousand nine hundred and thirteen.

[SEAL.] STEPHEN C. LITTLE,
Clerk Superior Court of Baltimore City.

94 No. 55, Jan. T., 1913. Sides. M. O.

Opinion of the Court of Appeals of Maryland.

Court of Appeals of Maryland, January Term, 1913.

THE CUMBERLAND GLASS MANUFACTURING COMPANY, a Corporation, Appellant,
vs.
CHARLES DEWITT, Trading as Charles Dewitt & Company, Appellee.

Judge BURKE delivered the opinion of the Court.

The amended declaration upon which this case was tried alleged that since the year 1886 the plaintiff had been a dealer in imported and domestic bottles, demijohns &c.; that the defendant the Cumberland Glass Manufacturing Company, a foreign corporation, was engaged in the manufacture of glass bottles, window glass &c., and conducted its factory at Bridgeton in the State of New Jersey; that it complied with the requirements of the law of this State which permit foreign corporations to transact business here, and that it was in fact doing business here. It further alleged that on February 8th, 1906, the plaintiff entered into a written contract with the Mallard Distilling Company of New York to supply them with one thousand gross of half pint lettered gin flasks eight ounce capacity, at the price of Two Dollars and Forty Cents per gross, and that on or about the same date did verbally enter into an additional contract with said company for another one thousand gross of bottles at Two Dollars and Forty Cents per gross, which bottles were to be made identical in every respect with those specified in the written contract. It then alleged "that the Cumberland Glass Manufacturing Company did, with knowledge of the existing contract, on or about the 15th day of February, 1906, by and through the medium of their agents, visit the said Mallard Distilling Company, and maliciously and without just cause with the intent to injure the plaintiff and to derive a benefit for itself, cause, induce,
95 and procure the said Mallard Distilling Company to rescind, break and violate their contracts" with the plaintiff. It fur-

ther alleged that at the time the Mallard Distilling Company broke its contracts, the plaintiff charged the defendant with having interferred with and caused the Mallard Company to break the contracts; that the defendant denied that it had in any way interfered with the contracts, or had procured, or caused the same to be broken; that the plaintiff was unable to procure sufficient proof against the defendant of its violation of duty, and that the proof of the facts was not known or exhibited to him until the latter part of the year 1909, but was fraudulently concealed and withheld by the defendant.

The defendant interposed three pleas; first, that it did not commit the wrong alleged; secondly, limitations; thirdly, res adjudicata based upon certain proceedings had in the United States District Court for Maryland, and particularly set out in the pleas. The plaintiff joined issue upon the first plea, and demurred to the second and third. The demurrer was overruled as to the second plea—limitations, and sustained as to the third plea—res adjudicata. The plaintiff replied to the plea of limitations, and, upon demurrer, the replication was held bad. He then filed an amended replication in these words: "That the said cause of action did accrue within three years prior to the filing of the said suit, in as much as the said Cumberland Glass Manufacturing Company, the defendant in the said cause, did fraudulently keep the plaintiff in ignorance of the said cause of action by fraudulently, deceitfully and dishonestly denying that it had in any way been guilty of any of the acts alleged in the said cause of action as set out in the amended declaration of the plaintiff, although the plaintiff did charge the defendant with the same upon the first of March in the year 1906; and the said facts did not come to the knowledge of the said plaintiff until the latter part of the year 1909, although he had used ordinary diligence to discover the same." The defendant demurred to this replication, and, its demurrer being overruled, filed a rejoinder upon which issue was joined.

96 The trial resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

The first question presented for consideration is the legal sufficiency of the declaration. This question is raised by the plaintiff's demurrer to the second and third pleas to the amended Narr., and by the defendant's second prayer, which refers to the pleadings, presented at the close of the case. The declaration is said to be bad for three reasons; first, because it contains no allegation that the plaintiff was able and willing to carry out his contracts with the Mallard Distilling Company; secondly, for duplicity, since it contains two complete, separate and independent causes of action in one count; thirdly, because one of the contracts was unenforceable under the statute of frauds and the declaration does not allege that but for the defendant's interference the Mallard Company would have carried out this contract, and would not have relied upon the defense of the statute. The first and second grounds of objection rest upon the doctrine declared in Dimmick vs. Hendley 117 Md. 458; Milske vs. Steiner Mantel Company 103 Md. 235, and other cases. But those cases have no application to cases of this kind.

The cause of action set out in the declaration is the wrongful interference by the defendant with the contract relations between the plaintiff and the Mallard Distilling Company. The cause of action is the tortious act of the defendant in procuring or causing the breach of the plaintiff's contracts with the Mallard Company. The suit is not upon the contracts, nor does it charge the defendant with several distinct torts. It charges one single tort resulting in damages to the plaintiff. It is well settled that a declaration, whether it is based upon a contract or upon tort, cannot combine in one count two distinct causes of action. But we do not regard the declaration in this case as open to this objection. Mr. Poe, in his first volume on Pleading and Practice, Section 734, says: "Much discussion will be found in the books in regard to what will and what will not make a pleading double. The best analysis of the adjudications, and the principles deducible from them is given by Mr.
97 Stephen. He shows that a pleading, under the old system, was not made double by immaterial matter, nor by matter pleaded only as necessary inducement to another allegation, nor by matters, however numerous, provided they constituted but one cause of action or one defense." It was necessary to the plaintiff's case that he should set out in the declaration his contracts with the Mallard Company, but these contracts were not his cause of action, and their statement in the declaration did not make it bad upon the principles stated by Mr. Poe. Nor does the fact that one of these contracts was oral affect the sufficiency of the narr. The contract is not void, although it might not have been enforcible against the Mallard Company. But this circumstance cannot avail the defendant. This was decided in Knickerbocker Ice Company vs. Gardner & Co. 107 Md. 556. We are of opinion that the declaration was sufficient.

We also hold that the amended replication to the plea of limitations was good. It is provided by Article 57 Section 14 Code 1912 that in "all actions where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall or with usual and ordinary diligence might have been known or discovered." The language of the replication sets out facts which avoid the plea. If the defendant did in 1906 wrongfully cause the Mallard Company to break its contracts, and the plaintiff was kept in ignorance of his rights by the false statements of the defendant, as the replication alleges there would seem to be no doubt that he is entitled to rely upon the statute to defeat the plea of limitations. This brings us to a consideration of the exceptions. The first exception presents no question for decision. Rule 25 of the Superior Court of Baltimore City, in which this case was tried, provides that: "Exceptions to the execution and return of a commission shall be made before the jury is sworn in the case, otherwise it shall be considered as waived." The record shows that the defendant woud "at the proper time object to the
98 was sworn that he wanted to give notice to the plaintiff that the defendant would "at the proper time object to the

depositions of a certain witness, First, which had been taken in the case"; but he filed no exceptions until after the jury was sworn and after the plaintiff had been examined, and, therefore, under the rule quoted exceptions as to the execution and return of the commission were waived. In the second exception it appears that the plaintiff's counsel offered to show the counsel for the defendant a letter written by the plaintiff to the Mallard Distilling Company. The defendant's counsel objected, but the letter was not offered in evidence. It is difficult to see how the defendant could have been injured by this ruling. The third and fourth exceptions may be considered together. On the 8th of February 1906, the plaintiff sent to the Mallard Distilling Company the following letter:

February 8th, 1906.

Mallard Distilling Co., New York.

GENTLEMEN: We have entered your order for (1,000) one thousand gross half-pint lettered gin flasks, eight ounce weight and eight ounce capacity, same as before.

We are to make these flasks at once, and you are to take two (2) cars not later than July 31st, 1906, and you are to take two remaining cars not later than July 31st, 1907.

Price to be $2.40 per gross, f. o. b. New York, packed in crates of one gross each. Terms 30 days or 2% for cash in ten days. Guaranteed first-class flint ware. Breakage not to exceed 2%.

Yours truly,

CHAS. DE WITT & CO.

Accepted:
MALLARD DISTILLING CO. (rubber-stamped).
CHAS. M. KOHN (written in ink),
Sec'y & Treas. (rubber stamped).

It is shown that Charles M. Kohn was the Secretary, Treasurer, and Manager of the Mallard Distilling Company. The third exception was taken to the introduction in evidence of an admission of Mr. Kohn that he had signed the acceptance endorsed on
99 the above letter, and the fourth exceptions was to the admission of the contract in evidence. This contract was alleged in the narr., and is one of the contracts which it is alleged was caused to be broken by the Mallard company by reason of the unlawful interference of the defendant, and the plaintiff had a right to prove the existence of this contract. There was no error in these rulings. What we have just said also applies to the fifth exception. There is nothing to show what testimony was objected to, or what questions the Court passed upon in the sixth and seventh exceptions, and, therefore, we cannot review its action. The eighth exception relates to the refusal of the Court to strike out an answer of the plaintiff. Part of this answer was proper, bearing upon the issue of limitations, and the motion being to strike out the whole answer, it was properly overruled. There was no error in the ruling on the ninth exception. This exception was taken to the ruling of the Court in permitting oral proof of the contents of a letter, which had

been destroyed, written by John F. Perry, the Sales Manager of the defendant company, to Robert B. Frist, one of its Salesmen. This letter will presently be referred to. Sufficient foundation was laid for the admission of oral testimony to prove its contents. The Court in the tenth exception refused to allow the plaintiff to answer a question as to whether he had made any defense to a petition filed against him in bankruptcy. This was a wholly immaterial inquiry. But subsequently the proceedings in Bankruptcy were put in evidence, and must have shown what, if any defense, the plaintiff made. There was no error in the 11th exception. The exception was made too late under the rules of Court above referred to. The twelfth to the fortieth exceptions inclusive all relate to certain questions propounded to Robert B. Frist and his answers thereto appearing in his deposition taken under a commission. Without discussing these exceptions separately, our conclusion is that we find no reversible error in any of the rulings.

At the conclusion of the whole case the plaintiff submitted two prayers which were granted. The Court also granted the
100 defendant's fifth and sixth prayers. The Reporter will set out the granted prayers in the report of the case. The defendant's first and second prayers ask the Court to direct a verdict for the defendant; first, because the plaintiff had offered no legally sufficient proof to entitle him to recover; and secondly, because under the pleadings there was no evidence in the case legally sufficient to entitle him to recover; and the defendant's third and fourth prayers ask that the case be withdrawn from the jury; first because there was no legally sufficient evidence to support the plaintiff's replication to the defendant's plea of limitation; and secondly, because under the pleadings there was no legally sufficient evidence to establish the allegations of that replication.

Since the decisions of this Court in Knickerbocker Ice Company vs. Gardiner Dairy Co., 107 Md. 556, and the Sumwalt Ice Co. vs. The Knickerbocker Ice Co. 114 Md. 403, there ought not to be any difficulty about the general principles of law in this State applicable to this class of actions. In those cases this Court adopted the conclusion reached by the majority of the judges of the Queen's Bench in Lumley vs. Gye, 2 El. & Bl. 216. The doctrine of that case has been followed in England in Bowen vs. Hall, 6 Q. B. D. 333; Read vs. Friendly Society &c. 2 K. B. 88; South Wales Miners' Federation et al. vs. Glamorgan Coal Co. Limited et al. Appeal Cases (1905) 238.

It has been affirmed by the Supreme Court of the United States in Angle vs. Chicago &c. R. R. Co. 151 U. S. 1 and is followed by many of the State Courts. That decision, as stated by Lord Macnaghten in Quinn vs. Leathen Appeal Cases (1901) 495, established this general proposition, "that it is a violation of legal right to interfere with contractual relations recognized by law if there is no sufficient justification for the interference."

Malice in this form of action does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse. In South Wales Miners' Federation

vs. Glamorgan Coal Company supra, Lord Lindley said:
101 "Bearing in mind that malice may or may not be used to denote ill will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments, but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill will, it is better to drop the word malice and so avoid all misunderstanding." The same principle was announced in Knickerbocker Ice Company case supra, in which Judge Boyd said: "Although many of the cases speak of the act as being maliciously done, it would seem to be clear that express malice is not necessary if the act is wrongful and unjustifiable." Turning now to an examination of the facts appearing in the record, we find evidence tending to establish the contracts between the plaintiff and the Mallard Distilling Company. Did the defendant know of these contracts, and did it intentionally cause the Mallard Company to break them? These are questions of fact. It is not the province of this Court to decide these questions. We are merely to determine whether the plaintiff offered evidence from which the jury might have reasonably found that the defendant had this knowledge and that it intentionally procured their cancellation. In our opinion the evidence of the plaintiff and that of Robert F. Frist and Charles M. Kohn was abundantly sufficient to have carried the case to the jury upon these questions. This evidence is uncontradicted, and tends to show that the defendant acquired knowledge of these contracts through Arthur MacLellan, its Agent in Baltimore, and that it intentionally deprived the plaintiff of the fruits of the contracts by offering the Mallard Company lower prices on the flasks. This was done by John F. Perry acting through the agency of Robert B. Frist one of the defendant's salesmen. The flask which the defendant was to furnish under his contracts was a special proprietary mold,
half pint bottle, with this lettering: "Mallard Distilling Com-
102 pany, Baltimore and New York, patent applied for." On the eighth or ninth of February 1906, Arthur MacLellan, the local agent of the defendant in Baltimore, came into the plaintiff's office. One of these bottles was laying upon the desk in the office. MacLellan picked up the flask, and was told by the plaintiff of his contract for two thousand gross. MacLellan asked that the defendant might be permitted to submit a price, and requested the plaintiff to mail the flask to the defendant, and that he would write, saying that he could get a good price. The plaintiff did mail the flask to the defendant and it was received by it, and four days after the flask had been sent the Mallard Company cancelled the contract.

John F. Perry wrote to Frist as follows: "Dewitt, Baltimore, mails us a Mallard Distilling Company flask. Go and take the business away from them. You have the price." The flask which the plaintiff had mailed was delivered by Perry to Frist at Bridgeton on February 10th 1906, with directions from Perry to get the order from the Mallard Company, "and if possible to procure it, using a

lower price than he thought Dewitt would be able to quote and make a profit." When the flask was delivered to Frist by Perry the name of the Mallard Company, which had been blown into the bottle, was concealed by a paper label pasted upon it which stated that the bottle had been filled with gin at some time by the Mallard Company. Unless, therefore, the defendant had a legal excuse or justification for its act, the plaintiff was entitled to recover; provided, the evidence supported the allegation of the replication to the plea of limitations.

Now, what is the justification upon which the defendant relies to exonerate itself from responsibility? It is the right of competition in trade. It asserts this proposition, that the right of competition justifies a defendant in knowingly and deliberately, for its own benefit or advantage, inducing the breach of a contract by offering lower prices. No case has been cited to support this contention. Counsel for appellant have cited a number of cases bearing upon the right of competition in trade or business. But this is altogether different from the right which one has to be protected from
103 interference with his rights under existing contracts. There is a wide distinction between the two classes of cases, and they are governed by distinct rules of law. The principles applicable to the first class are stated in Klingle's Pharmacy vs. Sharp & Dohme, 104 Md. 218, and in Mogul Steamship Company vs. McGregor, Gow & Co., Appeal Cases (1892) 25, and other cases cited on Appellant's brief.

In the last cited case it was said "that the procuring of people to break their contracts" is an unlawful act. In his opinion in that case Lord Morris said: "All the acts done, and the means used, by the defendant were acts of competition for trade. There was nothing in the defendant's acts to disturb any existing contract of the plaintiffs, or to induce any one to break such." In discussing the right of competition in Walker vs. Cronin, 107 Mass. 555, the Court said "everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque in juria, unless some superior right by contract or otherwise is interfered with."

We, therefore, hold that the right to compete furnished no justification to the defendant in this case.

We also hold that the evidence was legally sufficient to be considered by the jury on the issue raised upon the plea of limitation. The plaintiff suspected that the contracts with the Mallard Company had been cancelled through the act of the defendant, and it made an effort to ascertain that fact. The Mallard Company declined to give him any information, and John F. Perry deliberately misled him, and except for the information derived from Frist in the Fall of 1909 it is doubtful if he ever would have been able to connect the defendant with the violation of his contracts. The defendant got the full benefit under the general issue plea of all

the facts set out in its third plea, and no harm resulted to it in sustaining the demurrer to that plea.

104 The judgment will be affirmed.

Judgment affirmed, the appellant to pay the costs above and below.

Filed April 10th, 1913.

Whereupon the following judgment of the Court was entered, to wit:

"1913 April 10th. Judgment affirmed, the appellant to pay the costs above and below.

Op. BURKE, *J.*"

105 *Petition for Writ of Error.*

In the Court of Appeals of Maryland, January Term, 1913.

55.

THE CUMBERLAND GLASS MANUFACTURING COMPANY, a Corporation, Appellant,
vs.
CHARLES DE WITT, Trading as Charles De Witt & Company, Appellee.

Petition for Writ of Error.

To the Chief Judge and Honorable Judges of the said Court:

The petition of the Cumberland Glass Manufacturing Company, appellant in the above entitled cause, by Paul M. Burnett, Henry H. Dinneen and Arthur L. Jackson, its attorneys, hereby set forth, that on or about the 11th day of April 1913, the Court of Appeals of the State of Maryland made and entered a final order herein in favor of the appellee Charles De Witt trading as Charles De Witt & Company, against the Cumberland Glass Manufacturing Company, appellant, petitioner herein in which and whereby said Court of Appeals affirmed a judgment of the Superior Court of Baltimore City in favor of the said Charles De Witt, trading as Charles De Witt and Company Appellee against the said The Cumberland Glass Company appellant and petitioner herein, for the sum of $800.00 and costs. In this said final order and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said The Cumberland Glass Manufacturing Company petitioner herein all of which willl more in detail appear from the assignment of errors which is filed with and as part of this petition.

106 That the said Court of Appeals of the State of Maryland is the highest Court of the said State of Maryland in which a decision in this suit and this matter could or can be had.

Wherefore the Cumberland Glass Manufacturing Company appellant and petitioner, petitions and prays that a writ of error from

the Supreme Court of the United States may issue in its behalf to the Court of Appeals of the State of Maryland for the correction of errors so complained of, and that a transcript of record, proceedings, and papers in this case duly authenticated may be sent to the Supreme Court of the United States, to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and your petitioner discharged.

And your petitioner will ever pray.

Dated at Baltimore, Maryland, this 30th day of April, 1913.

PAUL M. BURNETT,
HENRY H. DINNEEN,
ARTHUR L. JACKSON,
Attorneys for Appellant.

Filed May 7th, 1913.

107 *Assignment of Errors.*

In the Court of Appeals of Maryland, January Term, 1913.

#55.

CHARLES DE WITT, Trading as Charles De Witt & Company, tion, Appellant,

vs.

CHARLES DE WITT, Trading as CHARLES DE WITT & COMPANY, Appellee.

Assignment of Errors.

The Cumberland Glass Manufacturing Company, appellant, in this cause in connection with and as part of its petition for a writ of error filed herein, makes the followi-g assignment of errors which it avers were committed by this Court and by the Superior Court of Baltimore City in the affirmance and rendition respectively of the judgment against this appellant appearing upon the record herein, that is to say:—

First. That the Court of Appeals of Maryland erred in holding and deciding that the third plea of this appellant to the appellee's amended narr., did not state facts sufficient to constitute a complete bar to the cause of action asserted by the appellee in his amended narr. This plea is as follows;—"For a third plea, says that prior hereto, to wit: on the 8th day of February, 1910, subsequent in point of time to the date of the commission of each and every alleged wrong set out in said amended declaration, the said plaintiff, Charles De Witt, individually and trading as Charles De Witt & Company by order of the United States District Court, in and for the District of Maryland was, under and by virtue of the laws of the
108 United States, adjudicated a bankrupt; that in the list of debts due and owing by said De Witt and by him returned

to said United States Court conformably to the law, the said De Witt, plaintiff herein as aforesaid, did return this defendant, said Cumberland Glass Manufacturing Company, as a creditor of him, the said Charles De Witt, in the sum of seven hundred and ninety 03/00 dollars ($790.03), which said claim was duly filed by this defendant against said De Witt in said bankruptcy proceedings; that among the unliquidated assets reported to said Bankruptcy Court by said plaintiff De Witt as constituting a part of his estate was a "chose in action" against this said defendant, listed as a claim of said De Witt's against this defendant as unliquidated damages for commissions and breach of contract, amounting to nine hundred and forty dollars ($940); that thereafter, to wit: on the 26th day of March, 1910, the said plaintiff (bankrupt) Charles De Witt filed a petition in said United States District Court for the District of Maryland, in said cause, wherein he set out that he had submitted a composition agreement to his creditors whereby they, said creditors, were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his said bankrupt estate; further, that a majority in amount of his said creditors had agreed to accept the terms of said composition agreement, wherefore the said De Witt prayed that the same be ratified by said Court; that the defendant in this suit, though one of the creditors of the said bankrupt, did not agree in writing, pursuant to the provisions of the Federal Bankrupt Act, or otherwise, to accept said settlement, but that as a majority in amount of said creditors did accept said settlement, the same was ratified nisi by said
109 Federal Court as of course; that item No. 93 in said composition account allowed to this defendant the sum of one hundred and fifty-eight 01/00 dollars ($158.01) as its dividend on its said claim of seven hundred and ninety 03/00 dollars (790.03), whereas no debit was made against it, said Cumberland Glass Manufacturing Company, by reason of the alleged claim of said De Witt against this defendant for the aforesaid sum of nine hundred and forty dollars ($940); that under and by virtue of the provisions of Sections 68-*a* of said Federal Bankruptcy Act it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said De Witt to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt against his said creditor against the claim of said creditor against the bankrupt, and pay, or demand the payment to the bankrupt estate, the difference between the accounts thus stated; that as the said referee, trustee and bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of $940, was justly due and owing by this defendant to the then bankrupt estate of the said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty

to have spoken and set out the same, if it was found by them or any of them to be due, against said defendant in said composition agreement, did not exercise its right to except to the ratification of
110 said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of twenty cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of twenty per cent. therefrom in satisfaction of all its claims against said De Witt and in exoneration by said De Witt from any and all claims which said De Witt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend and its acceptance by this defendant operated as a final settlement and adjustment, in a Court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended narr is res judicata.

PAUL M. BURNETT,
Attorney for Defendant.

Second. That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court of Baltimore City which sustained the appellee's demurrer to the said third plea of this appellant to the appellee's amended narr.

Third. That the Court of Appeals of Maryland erred in sustaining the judgment against this appellant rendered by the Superior Court of Baltimore City upon the sustaining of the demurrer of the appellee to the appellant's said third plea to the appellee's amended narr.

111 Fourth. That the Court of Appeals of Maryland sustained and affirmed the judgment of the Superior Court of Baltimore City in sustaining the demurrer of the appellee, to this appellant's third plea to the appellee's amended narr., whereas the judgment of this Court ought to have been rendered in favor of this appellant and against the appellee and ought to have reversed the judgment and ruling of the Superior Court of Baltimore City upon the demurrer of the appellee to the appellant's third plea to the amended narr.

Fifth. That the Court of Appeals of Maryland erred in sustaining the decision of the Superior Court of Baltimore City that the alleged claim for $800.00 of the appellee against the appellant, which is the cause of action, and basis of the judgment affirmed in this case by this Court, was not merged and offset in the bankruptcy proceedings to the extent of the claim of this appellant against the appellee filed and allowed in the said bankruptcy proceedings as set out in the record.

Sixth. That the Court of Appeals of Maryland erred in sustaining the decision of the Superior Court of Baltimore City holding that the claim for $800.00 which the appellee asserted and recovered on in this cause was not finally adjudicated and all his right and claim thereto extinguished in the proceedings in bankruptcy as mentioned

and set out in this appellant's third plea to the appellee's amended narr., whereas the Court should have held that the claim for $800.00 of the appellee against this appellant and on which the appellee recovered a judgment in the Superior Court of Baltimore City which judgment was by error affirmed in this Court in this cause, was decided and ended by the bankruptcy proceedings mentioned
112 in this appellant's third plea to the appellee's amended narr.

Seventh. That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court of Baltimore City which refused to grant the defendant's first prayer which is as follows; to wit:—"The jury are instructed that there is no evidence legally sufficient to entitle the plaintiff to recover in this cause and therefor the verdict of the jury must be for the defendant"; whereas said Court ought to have sustained the defendant's first prayer as above set forth and reversed the judgment in favor of the plaintiff and against the defendant, and granted this prayer, and directed a judgment for the defendant.

Eighth. That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court which refused to grant the defendant's second prayer which is as follows, to wit:—"The jury are instructed that under the pleadings there is no evidence legally sufficient to entitle the plaintiff to recover and therefore the verdict of the jury must be for the defendant", whereas said Court ought to have sustained the defendant's second prayer as above set forth and reversed the judgment in favor of the plaintiff and against the defendant, and granted this prayer, and directed a judgment for the defendant.

Ninth. That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court of Baltimore City which granted the plaintiff's first prayer which is as follows, to wit:—"The plaintiff prays the Court to instruct the jury that if they find from the evidence, that in the month of February, 1906, the plaintiff had entered into contracts with the Mallard Distilling Company to
113 supply it with 2,000 gross of glass flasks at $2.40 per gross, if they so find. And further find that the plaintiff was at all times able and ready to comply with said contracts, and furnish said flasks to the Mallard Distilling Company in accordance with said contracts, if they so find. And further find that before the time of delivery of said flasks by the plaintiff to the Mallard Distilling Company under said contracts, that the defendant or its agents obtained information of said contracts, if they so find, and the defendant with full knowledge of said contracts, dispatched one of its salesmen to the Mallard Distilling Company with instructions to said salesman to get the order of the Mallard Distilling Company for said flasks, if they so find, and did procure and induce the Mallard Distilling Company to break said contracts it had with the plaintiff for the said 2,000 gross of flasks for the purpose of benefiting itself or injuring the plaintiff, if they so find; then the verdict of the jury should be for the plaintiff; provided the jury further find, that the plaintiff was kept in ignorance of the cause of action for which this

suit is brought by the fraud of the defendant, if they so find, which fraud was not discovered and could not have been discovered by the plaintiff by usual and ordinary diligence, until the year 1909," whereas, this Court ought to have refused the plaintiff's prayer as above set forth.

Tenth. That the Court of Appeals of Maryland erred in affirming the judgment against the appellant for the reason that all the testimony whereon said judgment was based utterly fails to establish any illegal or wrongful interference by the said The Cumberland Glass Manufacturing Company with the interstate commerce
114 business between Charles De Witt trading as Charles De Witt & Company and the Mallard Distilling Company of New York, whereas the Court of Appeals of Maryland should have reversed said judgment and entered a judgment for the Cumberland Glass Manufacturing Company.

Eleventh. That the Court of Appeals of Maryland erred in holding that the act and conduct of the Cumberland Glass Manufacturing Company, its agents and servants, in obtaining the contract from the Mallard Distilling Company was an unlawful act of interstate commerce, for the reason that the uncontradicted evidence in the record fails to show that the acts of the said The Cumberland Glass Manufacturing Company or any of them were wrongful or unlawful either in the States of New Jersey or New York, where, by the uncontradicted evidence, said acts were committed, whereas the Court of Appeals of Maryland should have held that the uncontradicted evidence showed that the acts of the said The Cumberland Glass Manufacturing Company its agents and servants in obtaining the contract from the Mallard Distilling Company were lawful acts of interstate commerce and were not wrongful or unlawful either in the State of New Jersey or in New York.

Twelfth. That the Court of Appeals of Maryland erred in affirming the judgment of the Superior Court of Baltimore City in favor of Charles De Witt & Company and against the Cumberland Glass Manufacturing Company and in refusing to reverse said judgment and in refusing to enter judgment for the Cumberland Glass Manufacturing Company for the reason that under the pleadings the uncontradicted evidence embraced in the record discloses no wrongful or unlawful inte-ference by the Cumberland Glass Manufac-
115 turing Company with the interstate commerce relations between Charles De Witt & Company, and the Mallard Distilling Company but on the contrary the uncontradicted evidence shows that the acts of the Cumberland Glass Manufacturing Company complained of in this suit were legitimate and proper acts of interstate competition.

Thirteenth. That the Court of Appeals of Maryland erred in each and every particular in sustaining the rulings of the Superior Court of Baltimore City upon the prayers offered at the end of said testimony which are above set out, in previous assignments of errors, in this to wit; that the Court should have withdrawn the case from the jury and directed a verdict for the defendant, The Cumberland Glass Manufacturing Company.

Wherefore the said The Cumberland Glass Manufacturing Company prays that this judgment may be reversed.

THE CUMBERLAND GLASS MANUFACTURING CO.,
By ARTHUR L. JACKSON, *Attorney.*

Filed May 7th. 1913.

Whereupon the Court passed the following order, to wit:—

"Writ of error allowed upon the execution of a bond by the Cumberland Glass Manufacturing Company in the sum of $1,500.00. Said bond when approved to act as a supersedeas.

Dated at Annapolis, Maryland, this 7th day of May 1913.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland."

Filed May 7th. 1913.

116 *Bond With Approval Thereon.*

Know all men by these presents, That we the Cumberland Glass Manufacturing Company, as principal and The United States Fidelity and Guaranty Company are held and firmly bound unto Charles De Witt in the sum of Fifteen Hundred Dollars ($1500), to be paid to the said obligee, his personal representatives and assigns; to the payment of which, well and truly to be made we bind ourselves, our heirs, executors and administrators, severally and jointly by these presents.

Whereas, the above named the Cumberland Glass Manufacturing Company as plaintiff in error is prosecuting a writ of error in the Supreme Court of the United States to reverse a judgment rendered in the case of The Cumberland Manufacturing Company, appellant, vs. Charles De Witt, trading as Charles De Witt & Company, appellee, by the Court of Appeals of the State of Maryland.

Now therefore the condition of this obligation is such that if the above named Cumberland Glass Manufacturing Company, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Witness the corporate seal of the said The Cumberland Glass Manufacturing Company and the signature of Robert E. Shoemaker its President, this 8th day of May, A. D. 1913.

[Seal's place.] ROBERT E. SHOEMAKER, *President.*

117 Witness the Corporate Seal of the Said The United States Fidelity and Guaranty Company and the Signatures of Julian Brewer and Nicholas H. Green Attorneys of Said Company,

and the signature of said Company by W. W. Symington its Vice President.

JULIAN BREWER,
NICHOLAS H. GREEN,
[Seal's place.] *Attorneys,*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By W. W. SYMINGTON, *Vice President.*

STATE OF NEW JERSEY,
County of Cumberland, ss:

On this 8th day of May, A. D. 1913, personally appeared before me the subscriber a Notary Public of the State of New Jersey, in and for the County aforesaid, Robert E. Shoemaker who being duly sworn deposes and says, that he is the President of the said The Cumberland Glass Manufacturing Company; that the seal affixed to the aforegoing bond is the corporate seal of the said body corporate, and that said bond was signed and sealed on behalf of said body corporate by this affiant by authority of the said body corporate and he further acknowledged said instrument to be the free act and deed of the said body corporate, and that it was so executed by him on its behalf and as and for its corporate act and deed.

118 Witness my hand and Notarial Seal, the day and year first above written.

[Seal's place.] EUGENE L. R. LANING,
Notary Public.

The United States Fidelity and Guaranty Company.

STATE OF MARYLAND,
County of Anne Arundel, ss:

On this ninth day of May, one thousand nine hundred and thirteen, before me personally came Julian Brewer and Nicholas H. Green known to me to be the Attorneys of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of indemnity, as surety thereon, and who, being by me duly sworn, depose and say that they reside in the City of Annapolis, State of Maryland; that they are the attorneys in fact of said The United States Fidelity and Guaranty Company, and know the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13, 1894; allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of indemnity is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; that they signed their names thereto by like order and authority as

attorneys in fact of said company; and that the assets of said
119 company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of $1,500,000.

JULIAN BREWER,
NICHOLAS H. GREEN,
(Deponents' Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 9th day of May, 1913.

[Seal's place.] J. ROLAND BRADY.

Bond approved, This 10th day of May, 1913.

A. HUNTER BOYD,
Chief Judge Court of Appeals of Maryland.

Filed May 10" 1913.

120 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, between The Cumberland Glass Manufacturing Company, a corporation, Appellant and Charles De Witt, trading as Charles De Witt & Company, Appellee, a manifest error hath happened, to the great damage of the said The Cumberland Glass Manufacturing Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of May, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER,
Clerk District Court of the United States for the District of Maryland.

Allowed by

[Seal Court of Appeals, Maryland.]

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

[Endorsed:] Writ of Error. Filed May 15", 1913.

121 UNITED STATES OF AMERICA, *ss:*

To Charles De Witt, trading as Charles De Witt & Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Maryland, wherein The Cumberland Glass Manufacturing Company, a corporation is Appellant and *and* you are appellee and defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunter Boyd, Chief Judge of the Court of Appeals of Maryland, this tenth day of May, in the year of our Lord one thousand nine hundred and thirteen.

[Seal Court of Appeals, Maryland.]

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Test:
C. C. MAGRUDER, *Clerk.*

122 [Endorsed:] Service of the within Citation acknowledged this 14th day of May, 1913. Thomas G. Hayes, Att'y for Defendant in Error. Citation. Filed May 15", 1913.

123 STATE OF MARYLAND, *sct:*

I, C. C. Magruder, Clerk of the Court of Appeals of the State of Maryland do hereby certify that the said Court is the highest Court of law and Equity in said State in which a decision can be had.

I further certify that the aforegoing is a true transcript of record, opinion of the Court and judgment entered thereon, petition for writ of error, assignment of errors and order of Court thereon, and Bond with approval thereon endorsed, in the case there stated.

And in obedience to the commands of the within writ I now transmit said transcript of record together with the original writ of error and the original citation in said cause to the Supreme Court of the United States.

In Testimony Whereof I hereunto subscribe my name and the seal of the Court of Appeals of Maryland affix this third day of June, A. D. 1913.

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

Endorsed on cover: File No. 23,743. Maryland Court of Appeals. Term No. 191. The Cumberland Glass Manufacturing Company, plaintiff in error, vs. Charles De Witt, trading as Charles De Witt & Company. Filed June 9th, 1913. File No. 23,743.

Office Supreme Court, U.
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 191.

THE CUMBERLAND GLASS MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

CHARLES DEWITT,
TRADING AS CHARLES DEWITT & COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
Attys. for Plaintiff in Error.

KING BROS., PRINTERS, 413 E. LEXINGTON ST., BALTO., MD.

(23,743)

In The

Supreme Court of the United States.

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THE CUMBERLAND GLASS MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

CHARLES DeWITT,
Trading as Charles DeWitt & Company,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

THE FACTS AND QUESTIONS INVOLVED.

In the year 1906, Charles DeWitt, trading as Charles DeWitt & Company, the defendant in error (hereinafter designated for brevity as DeWitt), was engaged in the business of a glass jobber in Baltimore City, Maryland. In February of that year DeWitt made two contracts with the Mallard Distilling Company of New York, by which DeWitt agreed to sell and the Mallard Company to buy two thousand gross

of bottles at the price of four thousand, eight hundred dollars ($4,800.00) (Rec. pp. 6, 7, 21). This Company will hereinafter be referred to as the Mallard Company. The price which DeWitt was to have paid to the manufacturer to obtain the goods to fill this order was four thousand dollars ($4,000.00) (Rec. p. 23), leaving DeWitt a profit therefor on the transaction of eight hundred dollars ($800.00). For some years prior to the making of these contracts, DeWitt had been dealing with the Cumberland Glass Company, a corporation engaged in the manufacture of sundry glass products, at Bridgeton, New Jersey, which Company is the plaintiff in error on this Record, and for the sake of brevity will be hereinafter called the Glass Company. After making these contracts, the Mallard Company cancelled them with DeWitt, whereby he lost this profit of eight hundred dollars, but the Mallard Company refused at the time to state to DeWitt its reasons for cancelling the contracts, other than that they could save eight hundred dollars by buying elsewhere (Rec. p. 22). DeWitt immediately went to the home office of the Glass Company, and accused it of having stolen the business, but the Glass Company denied to DeWitt any knowledge of his contracts with the Mallard Company, and at the time DeWitt abandoned his proposed claim against them and let the matter drop, as he was then satisfied with their explanation. This all occurred in February, 1906, (Rec. p. 27).

In the spring of 1909, according to DeWitt, he was informed by a former salesman of the Glass Company, a certain Mr. Frist, that the Glass Company had taken the Mallard Company's order away from him (Rec. p. 31). Frist, however, when put on oath to testify for DeWitt, when his deposition was taken to be used in the case, said that at the time he got the contract from the Mallard Company he knew nothing of its contract with DeWitt (Rec. pp. 39 and 41, first x-Interrogatory), and that his instructions were to get

the order with a low price (Rec. pp. 39 and 41, fourth and fifth x-Interrogatories).

The Mallard Company agreed that the only thing Frist did which induced it to break the contract was to offer it better prices and terms (Rec. p. 59).

After DeWitt's interview with Frist, DeWitt proceeded to buy glassware from the Glass Company on credit to the extent of the amount of profit which he would have made on the Mallard order. DeWitt's motive in buying these goods upon credit is best expressed by himself:

> "I tried to get enough to cover my claim, so that they would have to sue me and put the burden of proof on them.
>
> "Q. So your purpose, therefore, in buying these goods and getting this indebtedness was to get a set-off against this claim?
>
> "A. I said I thought it was better that way." (Rec. p. 32.)

When DeWitt bought these goods from the Cumberland Glass Company, he gave the latter his note for seven hundred and ninety dollars and three cents ($790.03), the amount of the bill, and at the maturity of the note asked and secured an extension without making any payment on account (Rec. p. 32). Again in December, 1908, and March, 1909, DeWitt ordered more goods from the Glass Company, amounting to about twenty-five hundred dollars ($2,500.00). Before the time for the delivery of these goods arrived, DeWitt's note matured and, on account of his failure to pay it, the Glass Company ceased to do business with him and refused to ship these latter orders. One of the claims made by DeWitt in the original *narr.* in this case was for damages for this refusal of the Glass Company to ship these goods (Rec. pp. 2, 3).

DeWitt never did pay this note, and in February of 1910, the Glass Company, together with other creditors, filed a petition in the United States District Court for the District of Maryland in Bankruptcy, praying that DeWitt be adjudged a bankrupt. Five days later DeWitt was adjudicated a bankrupt and receivers were duly appointed (Rec. p. 31).

On February 26th, 1910, DeWitt filed his schedules in bankruptcy (Rec. p. 31). In his assets, DeWitt scheduled under the heading "Choses in Action" his claim against the Cumberland Glass Company, amounting to nine hundred and forty dollars ($940.00). This claim, it is conceded, was made up of the eight hundred dollar claim for the loss of the Mallard contract, which is the basis of this litigation, and a claim of one hundred and forty dollars growing out of the other contracts above referred to. This last claim of one hundred and forty dollars was stricken out of this case and is not involved in the issues here. He also scheduled in his list of debts the note held by the Cumberland Glass Company for seven hundred and ninety dollars and three cents.

After the appointment of receivers, DeWitt immediately began a campaign among his creditors, urging them to accept a composition of twenty per cent. (Rec. p. 29). He tried to induce the Glass Company to join in this composition, but it refused (Rec. p. 29). Nevertheless, a sufficient number of creditors did accept the proposition and the composition agreement was filed and ratified. By this agreement, the Glass Company was allowed one hundred and fifty-eight dollars and one cent, being twenty per cent. on its claim of seven hundred and ninety dollars and three cents. No mention or notice was made in the composition account of DeWitt's "chose in action" against the Glass Company of nine hundred and forty dollars (Rec. p. 31). Upon the ratification of this account, the checks were sent to the various creditors, including the Glass Company.

Less than ninety days after his discharge, on August 2nd, 1910, DeWitt brought suit in the Superior Court of Baltimore City against the Cumberland Glass Company. His *narr.* contained three counts, one based upon the eight hundred dollar claim, and the other two based upon the other claims now out of this case (Rec. pp. 1, 2, 3). His motive and purpose in bringing this suit is stated by DeWitt as follows (Rec. p. 34):

> "The bankruptcy, in my opinion, defeated those people there. I believe they had to accept my proposition. That did not release them from the eight hundred dollars they owed me, that they robbed me of three years before."

The original pleadings in this case resulted in the sustaining of a demurrer because of errors in the *narr.* The Court gave leave to amend the *narr.*, and DeWitt thereupon filed an amended *narr.*, which struck out the one hundred and forty dollar claim, and left only the eight hundred dollar claim as the basis of his suit (Rec. pp. 6, 7).

To the amended declaration the Glass Company pleaded:

1. *Non cul.*
2. Limitations.
3. *Res adjudicata.*

This third plea brings up one of the questions in this appeal. The plea sets forth at length the proceedings in the Federal Bankruptcy case, and claims that by virtue of the Federal Bankruptcy Law whatever claim DeWitt might have had against the Glass Company had been adjudicated and closed once and for all, and any liability of the Glass Company thereon had been terminated by the bankruptcy proceedings.

To this plea DeWitt demurred; the Superior Court of Baltimore City sustained the demurrer, thereby preventing the defendant from relying upon the bankruptcy proceedings

as a bar to DeWitt's action. There was a judgment below in favor of DeWitt for eight hundred dollars, which on appeal to the Court of Appeals of Maryland was affirmed (120 Md. 385), and the ruling of the Superior Court on DeWitt's demurrer to the Company's third plea was sustained, as well as the rulings on the prayers. To reverse that judgment this writ of error is prosecuted.

Briefly stated, the determination of this case depends upon the answer to the question: Does the Federal Bankrupt Act permit a bankrupt to take advantage of its provisions to relieve himself by a composition agreement of the just claims of his creditors, and thereafter to collect in full from them on claims which he had against them, and prevent them from using the balance of their claims against him when fraudulently contracted as a counter claim by virtue of his discharge in bankruptcy? Or, in another form, Does the Federal Bankrupt Act permit a bankrupt to force a composition settlement with his creditors at twenty cents on the dollar, and then allow him to collect from them at one hundred cents on the dollar?

This question is raised in this case in two ways: (1) by the ruling of the Superior Court of Baltimore City and the Court of Appeals of Maryland, in sustaining DeWitt's demurrer to the Cumberland Glass Company's third plea; and (2) by the ruling of the Superior Court on the prayers presented at the close of the entire case, all of which were sustained by the Court of Appeals of Maryland.

SPECIFICATION OF ERRORS.

The Assignments of Error in the Record are thirteen in number (Rec. pp. 73-77). We expressly waive the 9th, 10th, 11th and 12th Assignments of Error, and rely on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 13th Assignments of Error.

These are as follows:

First—That the Court of Appeals of Maryland erred in holding and deciding that the third plea of this appellant to the appellee's amended *narr.* did not state facts sufficient to constitute a complete bar to the cause of action asserted by the appellee in his amended *narr.* This plea is as follows:

> "For a third plea, says that prior hereto, to wit, on the 8th day of February, 1910, subsequent in point of time to the date of the commission of each and every alleged wrong set out in said amended declaration, the said plaintiff, Charles DeWitt, individually and trading as Charles DeWitt & Company, by order of the United States District Court, in and for the District of Maryland, was, under and by virtue of the laws of the United States, adjudicated a bankrupt; that in the list of debts due and owing by said DeWitt and by him returned to said United States Court conformably to the law, the said DeWitt, plaintiff herein as aforesaid, did return this defendant, said Cumberland Glass Manufacturing Company, as a creditor of him, the said Charles DeWitt, in the sum of seven hundred and ninety 03/00 dollars ($790.03), which said claim was duly filed by this defendant against said DeWitt in said bankruptcy proceedings; that among the unliquidated assets reported to said Bankruptcy Court by said plaintiff DeWitt as constituting a part of his estate was a 'chose in action' against this said defendant, listed as a claim of said DeWitt's against this defendant as unliquidated damages for commissions and breach of contract, amounting to nine hundred and forty dollars ($940); that thereafter, to wit, on the 26th day of March, 1910, the said plaintiff (bankrupt) Charles DeWitt filed a petition in said United States District

Court for the District of Maryland, in said cause, wherein he set out that he had submitted a composition agreement to his creditors whereby they, said creditors, were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his said bankrupt estate; further that a majority in amount of his said creditors had agreed to accept the terms of said composition agreement, wherefore the said DeWitt prayed that the same be ratified by said Court; that the defendant in this suit, though one of the creditors of the said bankrupt, did not agree in writing, pursuant to the provisions of the Federal Bankrupt Act, or otherwise, to accept said settlement, but that as a majority in amount of said creditors did accept said settlement, the same was ratified *nisi* by said Federal Court as of course; that item No. 93 in said composition account allowed to this defendant the sum of one hundred and fifty-eight 01/00 dollars ($158.01) as its dividend on its said claim of seven hundred and ninety 03/00 dollars ($790.03), whereas no debit was made against it, said Cumberland Glass Manufacturing Company, by reason of the alleged claim of said DeWitt against this defendant for the aforesaid sum of nine hundred and forty dollars ($940.00); that under and by virtue of the provisions of Section 68a of said Federal Bankruptcy Act, it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said DeWitt, to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt against his said creditor against the claim of said creditor against the bankrupt, and pay, or demand the payment to the bankrupt estate, the difference between the accounts thus

stated; that as the said referee, trustee and bankrupt DeWitt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of nine hundred and forty dollars ($940) was justly due and owing by this defendant to the then bankrupt estate of the said plaintiff, as claimed by said DeWitt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against the defendant when it was their duty to have spoken and set out the same, if it was found by them or any of them to be due against said defendant in said composition agreement, did not exercise its right to except the ratification of said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of twenty cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of twenty per cent. therefrom in satisfaction of all its claims against said DeWitt, and in exoneration by said DeWitt from any and all claims which said DeWitt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend, and its acceptance by this defendant operated as a final settlement and adjustment, in a court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended *narr.* is *res judicata.*"

Second—That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court of Baltimore City, which sustained the appellee's demurrer to the said third plea of this appellant to the appellee's amended *narr.*

Third—That the Court of Appeals of Maryland erred in sustaining the judgment against this appellant rendered by the Superior Court of Baltimore City upon the sustaining of the demurrer of the appellee to the appellant's said third plea to the appellee's amended *narr.*

Fourth—That the Court of Appeals of Maryland sustained and affirmed the judgment of the Superior Court of Baltimore City in sustaining the demurrer of the appellee to this appellant's third plea to the appellee's amended *narr.*, whereas the judgment of this Court ought to have been rendered in favor of this appellant and against the appellee, and ought to have reversed the judgment and ruling of the Superior Court of Baltimore City upon the demurrer of the appellee to the appellant's third plea to the amended *narr.*

Fifth—That the Court of Appeals of Maryland erred in sustaining the decision of the Superior Court of Baltimore City that the alleged claim for $800.00 of the appellee against the appellant, which is the cause of action, and basis of the judgment affirmed in this case by this Court, was not merged and offset in the bankruptcy proceedings to the extent of the claim of this appellant against the appellee filed and allowed in the said bankruptcy proceedings as set out in the Record.

Sixth—That the Court of Appeals of Maryland erred in sustaining the decision of the Superior Court of Baltimore City holding that the claim for $800.00 which the appellee asserted and recovered on in this cause, was not finally adjudicated and all his right and claim thereto extinguished in the proceedings in bankruptcy as mentioned and set out in this appellant's third plea to the appellee's amended *narr.*, whereas the Court should have held that the claim for $800.00 of the appellee against this appellant and on which

the appellee recovered a judgment in the Superior Court of Baltimore City, which judgment was by error affirmed in this Court in this cause, was decided and ended by the bankruptcy proceedings mentioned in this appellant's third plea to the appellee's amended *narr.*

Seventh—That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court of Baltimore City, which refused to grant the defendant's first prayer, which is as follows, to wit:

> "The jury are instructed that there is no evidence legally sufficient to entitle the plaintiff to recover in this cause, and therefore the verdict of the jury must be for the defendant";

whereas said Court ought to have sustained the defendant's first prayer as above set forth, and reversed the judgment in favor of the plaintiff and against the defendant, and granted this prayer, and directed a judgment for the defendant.

Eighth—That the Court of Appeals of Maryland erred in sustaining the ruling of the Superior Court, which refused to grant the defendant's second prayer, which is as follows, to wit:

> "The jury are instructed that under the pleadings there is no evidence legally sufficient to entitle the plaintiff to recover, and therefore the verdict of the jury must be for the defendant";

whereas said Court ought to have sustained the defendant's second prayer as above set forth and reversed the judgment in favor of the plaintiff and against the defendant, and granted this prayer, and directed a judgment for the defendant.

Thirteenth—That the Court of Appeals of Maryland erred in each and every particular in sustaining the rulings of the

Superior Court of Baltimore City upon the prayers offered at the end of said testimony which are above set out, in previous assignments of error, in this, to wit, that the Court should have withdrawn the case from the jury and directed a verdict for the defendant, the Cumberland Glass Manufacturing Company.

ARGUMENT.

The first question raised is the validity of the third plea to the *narr.* to which a demurrer was interposed and sustained in the Superior Court and affirmed on appeal to the Court of Appeals of Maryland. This plea sets out the fact that prior to the bringing of the suit the same claim here sued on had been scheduled by DeWitt in his schedule of assets; that a composition agreement to which the Glass Company was not a party was ratified by the United States District Court for the District of Maryland in Bankruptcy, and that, therefore, under Section 68a of the Bankrupt Act, these claims and counter claims were merged and settled in that proceeding, and they were, therefore, *res adjudicata.*

Section 68a of the Bankrupt Act is as follows:

> "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The trial Court sustained DeWitt's demurrer to this plea, thereby ruling that the facts set up in the plea constituted no defense whatever to the claim of DeWitt.

The Court of Appeals of Maryland affirmed the ruling of the lower Court in sustaining the demurrer to this plea (120

Maryland, 381), but in so doing used the following language, which, it is submitted, is error:

> "The defendant got the full benefit under the general issue plea of all the facts set out in its third plea, and no harm resulted to it in sustaining the demurrer to that plea." (Rec. p. 71.)

It is earnestly submitted that this language evades the question, because, if it be true that the facts set forth in the plea did constitute a defense to the claim of DeWitt, then the demurrer should have been overruled, and the sustaining of the demurrer did injure the Glass Company in this, that it effectually decided the point that even if all the facts set forth in the plea were proven, still they constituted no defense to the action, and if they did not constitute a defense to the action, then how is it possible for the Glass Company to have gotten the benefit of such facts under the general issue plea? This decision clearly begs the question. If these facts did constitute a complete bar to the action, then the demurrer should have been overruled and the plaintiff compelled to meet this plea by proper pleading, and thus the case should have gone to trial with the issue clearly settled—that the facts set forth in the plea, if proven, would constitute a complete defense to the action; as it was, the case went to trial with the ruling distinctly to the contrary. How, then, could there be any benefit to the defendant under the general issue plea of the facts set forth in the special plea?

Nor was the ruling upon the demurrer correct upon the technical ground that the plea was equivalent to the general issue. It was a plea of *res adjudicata*, and therefore it is proper that it should be specially pleaded.

Feldmeyer vs. Werntz, 119 Md. 285-290.

It is clearly the intention of the Bankrupt Act that when there are claims and counter claims between the bankrupt

and one of the creditors, this should be adjudicated in the bankruptcy proceedings and the net balance paid or collected by the trustee in bankruptcy.

In re Semmer Glass Co., 135 Fed. 77.

This is not only the spirit of the Act, but the spirit of the law generally, that one litigation should dispose of all the questions of the parties which are conveniently determinable in one suit. It is to be presumed that the duty of thus adjusting the account was done in the DeWitt case, and the Glass Company had the right to assume that when it received a check for one hundred and fifty-eight dollars and one cent ($158.01), in payment of the composition dividend. In other words, it had the right to assume that DeWitt himself knew and acknowledged that his claim for eight hundred dollars ($800.00) was valueless, and that that part of the account had been dropped as not being worth serious attention, because this provision of the Bankrupt Act is mandatory. Thus it is clear that DeWitt's claim against the Glass Company of eight hundred dollars ($800.00) was ended by the bankruptcy proceedings, if these claims came within the spirit and letter of Section 68a. There can be no doubt that the claim which the Glass Company had against DeWitt for seven hundred and ninety dollars and three cents ($790.03) was, on its face, a provable claim in bankruptcy and was a debt of the bankrupt estate. The question then remaining is as to whether the claim of DeWitt against the Glass Company is such as would be a "mutual debt" or "credit" within the meaning of this section of the Statute. If it should be urged that this was an unliquidated claim, the answer to that is that DeWitt had no difficulty in liquidating it, and none of the parties to this controversy ever had any doubt as to the amount of the claim; the Glass Company owed DeWitt eight hundred dollars ($800.00), or nothing, and there could be no difficulty in determining the exact amount

of DeWitt's claim. Certainly that which is liquidated in fact should be liquidated in law.

See—

In re Filer, 5 A. B. R. 582.

DeWitt's contention was that the Glass Company's action "robbed" him of a profit of eight hundred dollars (Rec. p. 24). The word "robbed" here was evidently used by DeWitt in a metaphorical sense, but even when used literally, it is the settled law that the right to recover it back is *quasi contractual,* and especially is that true if the property was taken from the plaintiff by fraud.

Downs vs. Baltimore City, 111 Md. 674, 692-694;

In re Filer, 5 A. B. R. 582.

This would seem to be the view taken by this Court.

Central Transportation Company vs. Pullman Company, 139 U. S. 60;

Pennsylvania Railroad Company vs. St. Louis Railroad Company, 118 U. S. 317.

This claim, therefore, being liquidated in fact, and being a *quasi* contractual claim, is provable in bankruptcy.

Collier on Bankruptcy, 10th Ed. 975;

In re Hirshman, 104 Federal, 69;

In re Filer, 5 A. B. R. 582.

It is therefore submitted that the claim sued on in this case was, (1) scheduled in the bankruptcy proceedings, and the parties to this suit were both parties to that proceeding; (2) that the claim was liquidated, (3) *quasi*-contractual, and was therefore (4) provable in bankruptcy, and is therefore (5) within the purview of Section 68a; and therefore the claim sued on here was properly and fully before the

Bankruptcy Court in that proceeding, and is therefore *res adjudicata,* and that the ruling of the State Courts sustaining the demurrer to that plea should be reversed.

The second question raised is reserved by the 7th, 8th and 13th Assignments of Error. They raise substantially this question, Should a trial Court have granted the defendant's second prayer, which reads as follows:

> "The jury are instructed that under the pleadings there is no evidence legally sufficient to entitle the plaintiff to recover, and therefore the verdict of the jury must be for the defendant."

This prayer embraces, under the law of Maryland, two proposition: (1) The sufficiency of the pleadings, and (2) It operates as a demurrer to the evidence.

> Railway Company vs. Wilkinson, 30 Md. 229;
> Ward vs. Schlosser, 111 Md. 532-535.

It must be conceded that under the pleadings in this case if the third plea of the defendant was good in law, then, of course, there could be no recovery in this cause because the facts set forth in that plea were admitted by the plaintiff by filing a demurrer; but, in addition thereto, the facts set forth in the plea were all proven at the trial. If the eight hundred dollar claim was adjudicated in the bankruptcy proceedings as urged in the first section, then, whether the plea technically was good or not, is unimportant because the defendant's second prayer covered the question from the standpoint of the evidence.

DeWitt at the trial of the case made no attempt to deny the bankruptcy proceedings (Rec. pp. 28-30), and by agreement of counsel, in order to shorten the Record, docket en-

tries in the bankruptcy proceedings were placed in the Record to take the place of the papers in full. (Rec. pp. 30-31).

It is submitted that in the payment of the dividend to the Glass Company, DeWitt either acknowledged that his claim against the Glass Company for eight hundred dollars was worthless and did not exist in point of fact, or that the payment was an error. If the first admission be correct, as we believe that under the law it is, then it put an end to DeWitt's case, and this prayer should have been granted; or if it was an error, then his only right of recovery would be under a properly framed *narr.* That payment could not be recovered back "under the pleadings" in this suit, as no such question was raised by the pleadings, nor any such a demand made in them, and therefore again this prayer should have been granted. It held the plaintiff's right to recover strictly to the pleadings.

Opinion of Court of Appeals (Rec. p. 66).

This prayer was therefore conclusive if, under either the third plea of the defendant or the evidence in the case, it is admitted that the claim for eight hundred dollars was finally adjudicated in the bankrupt case.

It is submitted that if this Court should hold that the bankrupt case did not adjudicate the claim of eight hundred dollars and merge it in that proceeding, then it must also be admitted that the Company's claim against DeWitt for seven hundred and ninety dollars was not merged by that proceeding.

Section 17 of the Bankrupt Act (as amended by the Act of 1903) provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2)

are liabilities for obtaining property by false pretenses or false representations or for * * * ."

That these goods were obtained by false representations is perfectly clear from DeWitt's own testimony. He admitted that he "thought it safer to get in their debt so I could hold them up." He further admitted that he tried to get enough goods so that the Glass Company would have to sue him, and put the burden of proof upon them (Rec. pp. 31, 32). Nevertheless he gave the Glass Company a note for these goods, and when it came due got an extension (Rec. p. 32).

He further testified on cross-examination as follows (Rec. p. 33):

"Q. And because they made no further claim on you you did not bring any suit?

"A. That is exactly correct.

"Q. Why did you bring the suit in August, 1910; were they making any claim on you then?

"A. To recover; what else? That is what the suit is for.

"Q. Didn't you delay because you knew in the meantime your note in bankruptcy was cut out?

"A. Absolutely not.

"Q. Now, the very minute that claim was gotten out of the way, that (it) could have brought against you, you brought the suit; isn't that correct?

"A. Do you think that is clever or not?"

DeWitt therefore admits that he purchased the merchandise for which his note of seven hundred and ninety dollars was given without any intention of paying for the goods, although this fact was not communicated to the Glass Company, and he further kept them in ignorance of it by asking for and receiving an extension on his note. This, therefore, was a liability created by a false representation within the

meaning of the Statute, and was not released by DeWitt's discharge in bankruptcy, and his liability on the note therefore continues to be a subsisting obligation.

Atlanta Co. vs. Jacobs, 25 A. B. R. 895;
Powell vs. Ricker, 18 A. B. R. 651;
Talcott vs. Friend, 179 Fed. 676;
Frey vs. Torrey, 8 A. B. R. 196.

The fact that there were false representations on the part of DeWitt may well be gathered from an inspection of the entire Record, but it is not necessary that this issue be raised in the pleadings, as, under the practice in Maryland, the whole question is properly raised by the first and second prayers of the Glass Company set forth in the seventh and eighth assignments of error.

Ward vs. Schlosser, 111 Md. 528.

The action of the Glass Company in proving their claim against DeWitt was not a waiver of their right to recover for the same debt on the ground that it was not dischargeable in bankruptcy.

Standard Company vs. Kattell, 22 A. B. R. 376;
Frey vs. Torrey, 8 A. B. R. 196.

It is therefore submitted that if this Court should hold that the claim of DeWitt against the Glass Company for eight hundred dollars was not discharged by the bankruptcy proceeding, then the same law necessarily holds that the Glass Company's claim against him of seven hundred and ninety dollars is not dischargeable nor discharged in the bankruptcy proceedings, and in that aspect of the case DeWitt's recovery would be limited to the difference between the amount of his note and his claim of eight hundred dollars, plus the amount of the dividend paid to the Glass Company; but that again could not be recovered in this action, and the Glass

Company's second prayer (eighth assignment of error) would effectually prevent such recovery in this case, because it was not set forth nor demanded in the *narr.* It is therefore respectfully submitted that, under any one of the three aspects of this case which the Court may take, the Glass Company's first and second prayers should have been granted on account of the provisions of the Bankruptcy Statute, and that under none of the aspects of this case could DeWitt recover on account of that Statute. And the plaintiff in error therefore asks for a reversal without a *procedendo.*

All of which is respectfully submitted,

ARTHUR L. JACKSON,
HENRY H. DINNEEN,
Attys. for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 191.

THE CUMBERLAND GLASS MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

CHARLES DEWITT,
TRADING AS CHARLES DEWITT & COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

THOMAS G. HAYES,
LEWIS W. LAKE,
Attys. for Defendant in Error

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This case reaches the Supreme Court of the United States upon a writ of error, complaining of the decision of the Court of Appeals of Maryland, after it had reviewed the proceeding held before the Superior Court of Baltimore City (the trial Court).

The assignments of error are thirteen in number, of which the ninth, tenth, eleventh and twelfth are expressly waived by the brief of the plaintiff in error, page 6, the nine re-

maining assignments of error raise but one contention, which is to the rulings of the trial Court on the third plea to the amended narr, this plea is set out in full (R., p. 7), the rulings were sustained by the Court of Appeals of Maryland.

The nine assignments of error we divide up in the following manner: 1, 2, 3 and 4 refer to the demurrer to the plea in question; 5 and 6 contend that it was error on the part of the State Courts not to find that the bankruptcy proceedings had wiped out the claim of De Witt's against the Cumberland Glass Manufacturing Company; 7, 8 and 13 referred to the prayers and the question of the sufficiency of evidence.

ARGUMENT.

The entire appeal to this Court, in our opinion, rests upon this plea, which is radically bad, because it is a collateral attack, made in the Superior Court of Baltimore City upon proceedings had in the District Court of the United States for the District of Maryland, in the matter of Charles De Witt in Bankruptcy. The plea charges the referee and trustee, in their official capacity, with a failure to perform certain acts which were required of them by law, which make an issue for trial by a jury of the correctness of the proceedings of the Federal Court and because it is multifarious and indefinite or uncertain.

The plea in question, after describing the bankruptcy proceedings, makes the following charges:

> 1st. That the Cumberland Glass Manufacturing Company was mislead by the trustee and referee because of their silence in ignoring the claim against the Cumberland Glass Manufacturing Company when they should have set it off.
>
> 2nd. That due to the above, the Cumberland Glass Manufacturing Company did not exercise its right to except to the ratification of the composition account.

3rd. That the Cumberland Glass Manufacturing Company unwillingly accepted its dividend allowed in the composition account.

4th. That the Cumberland Glass Manufacturing Company accepted the dividend in exoneration of all claim against it by DeWitt.

5th. That the payment and acceptance of the dividend operated as a final adjustment of all their claims, and the case is *res judicata*.

It says there was no set off, that the dividend amounted to a release and that the claim is *res judicator,* all in one plea,

It would be difficult to know from such contradictions what defense the plea makes; is De Witt to defend the attack on the proceedings of the United States District Court, or to disprove a release or to rebut the allegaton of *res judicata?*

COLLATERAL ATTACK ON BANKRUPTCY PROCEEDING.

Whatever may have been the duty of the Bankrupt Court, the referee, or the trustee, in the De Witt matter, to have determined the validity of the unliquidated claim De Witt had entered in his schedules under the head "chose in action" against the Cumberland Glass Manufacturing Company. so that it could have been set-off against the claim filed by the Cumberland Glass Manufacturing Company against DeWitt, *the fact remains that it was not done,* and whether it was error or improper as this plea contends, it is certainly a collateral attack on the proceeding of another tribunal.

What right has the Superior Court of Baltimore City, or the Court of Appeals of Maryland to review the proceedings of the District Court of the United States for Maryland and say that the claims should have been set off, or that the dividend operates as a release to Cumberland, or to decide what claims are to be considered as finally adjudicated?

Such a state of affairs would be placing in any Courts the power of reviewing and determining the correctness of the trial of a Court even of greater magnitude, indeed even of the Court of Appeals of the State or the Supreme Court of the United States.

An attack upon the proceedings of a trial Court can only be made in one of two ways, upon appeal or by a direct proceeding in the Court of that purpose, but not collaterally even in the same Court, for this would perplex litigants and Courts with ceaseless litigation in cases already disposed of, for by a subterfuge any question determined adversely to a party could be raised by simply charging error or improper proceedings in the trial, no question under such circumstances could ever be finally determined.

The Maryland Court of Appeals as far back as 1827 said in

Raborg vs. Hammond, 2 H. & G. 49:

> "Is it competent for a Court of law to go into and inquire whether administration has been rightfully granted or not?
>
> If such inquiry can be made in this incidental collateral mode of proceedings you convert the county Courts into appellate tribunals to revise and reverse the decrees of the Orphans' Court, on subjects over which by law they have the sole and exclusive jurisdiction.
>
> Every consideration, therefore, of convenience, justice, and public policy, demands that the question of administration, when finally determined by the tribunals created for that purpose, should never be a subject of doubt or litigation when incidentally arising in other Courts. Such an anomaly in judicial proceedings, this Court would never willingly sanction."

Cook vs. Carroll, 6 Md. 112.

"It is a well settled principle of law that the acts of a competent tribunal cannot be reviewed collaterally. They are to be taken as a just and proper exercise of power in all Courts. *If, in fact, they should have been founded in error the law points out a mode in which the wrong is to be corrected.* In most cases it is either by appeal, or by application to the Court, whose act is the subject of complaint."

Taylor vs. Miller, 73 Md. 220.

"Now, the plea which we are considering was intended to make for trial by a jury, an issue as to whether the order ratifying the auditor's report was procured by fraud. Its effect would have been to submit to the jury, for review by them in a Court of law, the regularity and propriety of an order, passed by a Court of Equity, in due form, and with respect to a subject exclusively within the jurisdiction of the latter Court. Thus not only would that order have been brought collaterally into question, but a Court of law would have been actually transformed into an appellate tribunal to pass upon a subject wholly outside of its well-defined jurisdiction."

In this same case, pages 221 and 222, the Court says regarding the Act of 1888, Chapter 547, which permitted equitable defences to be pleaded in Courts of Law, in Maryland.

That the Act was not meant to bestow upon Courts of Law the power of reviewing the proceedings of other Courts, or to destroy the distinction which exists between Courts of law and Courts of Equity.

Huttig vs. Edwards, 160 Fed. 619 (C. C. A. Iowa).

"An adjudication of bankruptcy is entitled to the same verity and IS NO MORE TO BE IMPEACHED COLLATERALLY THAN OTHER JUDGMENTS OR DECREES OF COURTS OF COMPETENT JURISDICTION."

In Re: Isaacson, 174 Fed. 406 (c.c. a. N. Y.).
Rose vs. Stroh, 165 Fed. 628 (c.c. a. Pa.).
In Re: H. E. Cox, 164 Fed. 823 (c.c. a.).
Gilbertson vs. W. S., 168 Fed. 672 (c.c. a.).

This is the basis of an attempt to make a plea perform the functions of a writ of error or an appeal to this Court.

In Re: Lennon, 166 U. S. 552.

The case above and those cited therein, show it to be contrary to the precedents laid down in this Court to allow the various pleadings to be used to perform the functions of appeal or writ of error.

SET-OFF.

The plea says the claims were not set off, and the transcript of the docket entries of the Federal Court offered in evidence fails to show that they were set off or that any action was taken on the date against the Cumberland Glass Manufacturing Co., but that the trustee paid the Cumberland Glass Manufacturing Company the dividend on its claim as proven in bankruptcy, leaving undetermined the validity of the alleged claim scheduled by DeWitt against the Cumberland Glass Manufacturing Company, which, according to the Bankruptcy act, Section 70, Subsection F, revested in DeWitt upon ratification of the composition.

The proof of claim of the Cumberland Glass Manufacturing Co. contained an affidavit "that there are no set-offs or counter claims to the same," yet counsel in their brief say there is a set-off, and they have been deceived by the Bankruptcy proceedings, the affidavit to their claim shows that the statements in the plea are false, or at least that they tried to practice a fraud on the Federal Court by taking a false oath, yet they ask for relief on the very subject.

U. S. Bankruptcy Act as amended, Chapter 4,

Section 21, Subsection F.

"A certified copy of an order confirming or setting aside a composition granting or setting aside a dis-

> charge, not revoked, shall be EVIDENCE of the jurisdiction of the Court, THE REGULARITY OF THE PROCEEDINGS, and the fact that the order was made."

The plea admits the confirmation of the composition, and as there was no evidence that the order confirming the composition was revoked, there can be no question as to the regularity of the proceedings according to the tenor of this clause of the Act.

The plea, therefore, we respectfully submit, is bad because of the above reasons, and further, should the questions of collateral attack and set-off not be considered, it is bad on edmurrer because of the elementary principals of indefiniteness, surplusage and multifariousness, the plea contains a detailed statement of the proceeding in bankruptcy, the failure of performance of acts required by the act of the trustee and the referee, a charge of exoneration or release and *res judicata*.

We now direct the attention of the Court to the question of set-off as stated in the plea referred to, and consider if it does automatically set off the several matters as the scheduled stated existed, or whether, in such cases, when either party desires to avail of the right, it has to be specially applied for, and in all cases where it is not, the right or benefit is deemed as waived.

Section 68A of the Bankrupty Act:

> "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, THE ACCOUNT SHALL BE STATED, and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The Court will observe by the Record that *no account was ever stated between the Bankrupt and the Cumberland Glass Manufacturing Company,* and no set-off was ever taken

advantage of by either of the parties, the plea contends that no set-off was ever had.

N. Y. Co. Bank vs. Massey, 192 U. S. 146 (Day, J.).

> "It would seem clear that the parties stood in the relation defined in Section 68A, WITH THE RIGHT to set off mutual debts."

Scammon vs. Kimball, 92 U. S. 371 (Clifford, J.).

> "That any loss sustained by the complainant at the time and in the manner alleged, for which the bankrupt corporation were and are liable as insurers, MAY BE SET OFF against that claim of the bankrupt corporation."

Traders Bank vs. Campbell, 14 Wall. 97 (Miller, J.)

> In this case the Court uses these words "instead of exercising their own RIGHT OF SET-OFF,"

and further on,

> "In this case, as in the others, *IF THEY HAD STOOD ON THEIR RIGHTS OF SET-OFF.*"

> In the case of Bank vs. Massey, above cited, page 146, Justice Day said, "THE RIGHT OF SET-OFF WAS NOT RELIED UPON."

There can be no question, in view of the language adopted by this Court with reference to Section 68A, that it provides a remedy which the parties may avail themselves of, but which by no means operates as a compulsion, or automatically by law, but only upon petition by the parties.

As the plea states that the claims were not set off, the fact remains that the claim which is now the subject matter of this suit is still in existence, whether, as alleged, by the error of the Federal Court or not.

If, as the plea contends, that payment of the dividend in the composition operated as a release from all claims that

the Bankrupt had against the creditor and we fail to find any such law, or see where they have cited any authorities, great injustice would arise in many cases where compositions had been effected.

In the case before the Court, DeWitt was kept in ignorance of the cause of action for more than three years; for example, should DeWitt not have found out he had a cause of action until after his bankruptcy and the effecting of the composition and the creditor had received his dividend, would any Court say that he would be barred from recovery, and that the compostion operated to release the creditor, or that *res judicator* could be successfully pleaded?

The Cumberland Glass Manufacturing Company tried by fraud and dishonesty up to and through the trial to conseal the facts, could it be said under circumstances like this that the payment of a composition dividend operated automatically as a release by the bankrupt to the creditor from all liability or is set off or is *res judicata?*

COMPOSITION RESTORES ESTATE TO BANKRUPT FREE FROM DEBTS OF CREDITORS.

Remington on Bankruptcy, Vol. 2, Section 2346.

"A composition restores the estate to the bankrupt free from all his debts provable and dischargeable in bankruptcy, and distributes among his creditors the amounts the bankrupt is required thereby to pay for the ransom of his estate."

Bankruptcy Act, Section 70, Sub. F.

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

Section 21, Sub. G.

"A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, * * *."

In Re: Rider, 96 Fed. 808.

"The effect of a composition is to supercede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors."

Remington on Bankruptcy, page 1425.

"Suits begun by the trustees which the bankrupt might have instituted had there been no bankruptcy, are not abated by the confirmation of the composition, but the title to the right of action revests in the Bankrupt."

See

In Re: Becker Bros., 15 A. B. R. 231.

We assume, therefore, that as the plea states the claims were not set off, that the cause of action (close in action) did revest in the bankrupt, DeWitt, upon the confirmation of the compositon.

If the claims are mutual debts or credits, it became the duty of the Cumberland Glass Manufacturing Co. to avail itself of the rights the law held out and its precautions, and the failure was due to their gross carelessness, a practice we do not believe this Court will recommend.

Under the general issue plea the defendant got the full benefit of all the facts set out in the third plea (R., p. 71). What the Court of Appeals of Maryland meant by this is very plain to any one conversant with the record in this case. The bankruptcy proceedings and the action of the Federal Court were put in evidence by the defendant and went to the jury (R., p. 3-O). In addition to these entries the plaintiff, DeWitt, was examined and cross-examined about his bankruptcy. Yet all of the evidence on this point utterly failed to substantiate any of the charges made by the plea, no further attempt was made by the defendant in support of the fact in the plea, all of the evidence showed

that the mention of *res judicata* was unfounded. How can it be said that under the general issue they were deprived of the benefits of the plea, except *res judicata.*

LASTLY FOR ARGUMENT.

The jury found that the plaintiff, DeWitt, was entitled to damages to the extent of $800.00 and that the claim was a that the good one against the Cumberland Glass Manufacturing Co. The claim filed by the Cumberland Glass Manufacturing Company against DeWitt amounted to $790.03, leaving a balance of $9.97 in favor of DeWitt, under the composition the Cumberland Glass Manufacturing Company received a dividend amounting to $158.01. Therefore, should this Court find that the claim was automatically set-off the plaintiff, DeWitt, is still entitled to recover a judgment for these two amounts, $9.97 and 158.01, which totals $167.98.

CONCLUSION.

Under the pleadings and rulings of the Court in this case we believe that the facts were fully presented and that the parties had a fair trial and that the jury determined their rights without prejudice.

We, therefore, ask the Supreme Court of the United States to affirm the rulings of the Court of Appeals of Maryland and the Superior Court of Baltimore City and dismiss the appeal.

THOMAS G. HAYES,

LEWIS W. LAKE,

Attorneys for Defendant in Error.

CUMBERLAND GLASS MANUFACTURING COMPANY *v.* DE WITT AND COMPANY.

ERROR TO COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 191. Argued March 10, 1915.—Decided May 10, 1915.

A plea of former judgment in a Federal court adjudicating a right of Federal origin, asserts a right which if denied makes the case reviewable here under § 237, Judicial Code. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The effect of a composition proceeding as provided in the Bankruptcy Act is to substitute that proceeding for the bankruptcy proceeding and in a measure to supersede the latter, and, when the composition is confirmed, to reinvest the bankrupt with all his property free from claims of his creditors.

Composition proceedings arise from the bankruptcy proceedings and this part of the statute is to be construed with the entire act. *Wilmot* v. *Mudge*, 103 U. S. 217.

The restoration of his estate to the bankrupt after a composition restores to him the right of action upon choses in action. *Cf. Stone* v. *Jenkins*, 176 Massachusetts, 544.

The object of the set-off provision in § 68-a of the Bankruptcy Act is to permit the statement of accounts between the bankrupt and his creditor with a view to the application of the doctrine of set-off between mutual debts and credits; it is permissive rather than mandatory, does not enlarge the doctrine of set-off and cannot be invoked where the general principles of set-off would not justify it.

The set-off provision in § 68-a of the Bankruptcy Act is not self-

executing and its benefit is to be had only upon the action of the District Court when it is properly invoked.

After composition had been affirmed by the Bankruptcy Court against the opposition of a creditor, a claim against whom by the bankrupt had been scheduled as an asset, the creditor, without applying to the District Court to set off the mutual claims, accepted the composition dividend, after which the bankrupt sued on the scheduled claim. *Held* that:

The effect of the composition was to reinvest the bankrupt with all of his assets including the right to maintain a suit on the choses of actions including this claim against this creditor.

There was no automatic set-off under § 68-a of the Bankruptcy Act.

The effect of the composition was not to extinguish the claim of the bankrupt against the creditor on his claim against the latter and there was no adjudication that could be pleaded as *res judicata* in a Federal court, and the state court did not err in respect to any Federal question in rejecting the plea of *res judicata*.

120 Maryland, 381, affirmed

THE facts, which involve the construction and application of certain provisions of the Bankruptcy Act in regard to appeals of mutual claims of the bankrupt and the creditors, are stated in the opinion.

Mr. Henry H. Dinneen and *Mr. Arthur L. Jackson* for plaintiff in error.

Mr. Thomas G. Hayes and *Mr. Lewis W. Lake* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Defendant in error, Charles De Witt, trading as Charles De Witt & Company, plaintiff in the court below and hereinafter spoken of as the plaintiff, brought his action in the Superior Court of Baltimore City, Maryland, to recover of the Cumberland Glass Manufacturing Company, hereinafter called the Glass Company, upon the ground that De Witt, having entered into a written contract with the Mallard Distilling Company of New

York to supply them with certain lettered flasks, the Glass Company, with knowledge of that contract, by and through the medium of their agents, did visit the Mallard Distilling Company, and maliciously and without just cause, with the intent to injure the plaintiff and to derive a benefit for itself, did cause, induce, and procure the said Mallard Distilling Company to rescind, break and violate its contract with the plaintiff. Pleas were interposed, and a trial was had in the Superior Court, resulting in a verdict and judgment in favor of the plaintiff, which judgment was affirmed in the Court of Appeals of the State of Maryland (120 Maryland, 381), and the case was brought here.

Summing up the defenses made in the state court, the Maryland Court of Appeals said (120 Maryland, 386) "The defendant interposed three pleas—first that it did not commit the wrong alleged; secondly, limitations; thirdly *res judicata*, based upon certain proceedings had in the United States District Court for Maryland, and particularly set out in the pleas."

The Federal question, which is the basis of jurisdiction here, arises upon the plea of *res judicata* to which a demurrer was sustained in the Maryland court of original jurisdiction which judgment was affirmed by the Court of Appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal origin, asserts a right which if denied made the case reviewable here under § 709, Revised Statutes, § 237, Judicial Code. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

From this plea, it appears that the plaintiff, trading as Charles De Witt and Company, was adjudicated a bankrupt in the United States District Court of Maryland, on the eighth day of February, 1910; that in the list of creditors, plaintiff listed the Glass Company as a creditor in the sum of $790.03 (which claim was upon a

promissory note); that proof was duly made of this claim against the plaintiff, in the bankruptcy proceeding; and that among the unliquidated assets reported to the bankruptcy court by the plaintiff was a chose in action against the Glass Company, listed as a claim of De Witt's against the defendant, of unliquidated damages for commissions and breach of contract, in the sum of $940. (The testimony showed that this was the same claim sued upon in the Maryland state court so far as the demand for $800 damages is concerned.) The plea shows that afterwards, on the twenty-sixth day of March, 1910, the plaintiff filed a petition in the United States District Court, setting out that he had submitted a composition to his creditors whereby they were to accept twenty cents on each dollar of their respective claims in full settlement of their demands against him and his bankrupt estate; further, that a majority in amount of said creditors had agreed to accept the terms of the composition agreement, wherefore he prayed that the same be ratified by the court; that the Glass Company did not agree in writing, pursuant to the provisions of the Bankruptcy Act, or otherwise, to accept said settlement, but as a majority in amount of said creditors did accept the same, it was ratified by the Federal court, and there was allowed to the defendant the sum of $158.01, as a dividend on its claim of $790.03; that no debit was made against the Glass Company by reason of the alleged claim of De Witt against it for the sum of $940.

Further, "that under and by virtue of the provisions of § 68-a of said Federal Bankruptcy Act it was and became the duty of the referee in bankruptcy and the trustee in bankruptcy representing the bankrupt estate of said De Witt to investigate and determine the existence and validity of any claim asserted by said bankrupt against any creditor filing his claim against said estate; and thereupon to set off the claim of such bankrupt

against his said creditor against the claim of said creditor against the bankrupt, and pay, or demand the payment to the bankrupt estate the difference between the accounts thus stated; that as the said referee, trustee and bankrupt De Witt, the latter the plaintiff herein, did not assert or claim, in said composition account, that any portion of the aforesaid sum of $940 was justly due and owing by this defendant to the then bankrupt estate of the said plaintiff, as claimed by said De Witt in his schedule of assets; that this defendant, being led to believe by the action of the said referee, trustee and bankrupt in remaining silent and ignoring said bankrupt's alleged claim against this defendant when it was their duty to have spoken and set out the same, if it was found by them or any of them to be due, against said defendant in said composition agreement, did not exercise its right to except to the ratification of said composition account, but suffered said composition account to be finally ratified and confirmed, and unwillingly accepted the settlement of twenty cents on the dollar made according to the tenor of said composition agreement; that this defendant received and accepted its dividend of twenty per cent. therefrom in satisfaction of all its claims against said De Witt and in exoneration by said De Witt from any and all claims which said De Witt at that time had or claimed to have, and this defendant says that the payment to it by said bankrupt of said dividend and its acceptance by this defendant operated as a final settlement and adjustment, in a court of competent jurisdiction, of any and all claims which the parties to this suit then had, or claimed to have, against each other. Wherefore, this defendant says that the alleged cause of action set out in the plaintiff's amended narr. is *res judicata.*"

As it was the effect of the judgment of the state court to deny this plea of *res judicata*, it will be necessary to consider somewhat the nature of the proceeding.

Compositions in bankruptcy are provided for by the Bankruptcy Act of 1898, c. 541, 30 Stat. 544. By § 12 of the Act, the bankrupt is permitted to offer a composition after he has been examined in open court or at a meeting of his creditors, and after he has filed in court a schedule of his property and a list of his creditors. Since the Amendment of 1910 the offer may be made either before or after adjudication. In order that the composition be effectual, it must be accepted in writing by a majority in number of all the creditors, and the consideration to be paid by the bankrupt to his creditors and the money necessary to pay debts having priority and the cost of proceeding must be deposited in a place to be designated by, or subject to the order of, the judge. The judge shall confirm the composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any of the acts nor failed to perform any of the duties which would be a bar to his discharge, and that the offer and acceptance are in good faith and have not been made or procured by the means prohibited in the Act. Upon confirmation of the composition, the consideration is distributed as the judge shall direct, and the case dismissed. Whenever the composition is not confirmed, the estate shall be administered as otherwise provided in the Bankruptcy Act.

Under § 70-f of the Act, it is provided that, upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him. By § 21-g of the Act it is also provided that a certified copy of the order of confirmation shall constitute evidence of the revesting of the title, and when recorded, shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. The order of confirmation becomes in effect a discharge, and is pleaded in bar with like effect. It operates to discharge the bankrupt from all debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

It is thus apparent that, although the composition is provided for by the Bankruptcy Act, it is in some respects outside of the Act, for it is provided that, if the composition is not confirmed, the estate shall be administered in bankruptcy, as in the Act provided.

The nature of composition proceedings is nowhere better stated than by Judge Lowell in *In re Lane*, 125 Fed. Rep. 772, 773, in which it is said:

"The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12-e (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides: 'Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.' Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property whether the debtor likes it or

not. . . . The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3448]) has the same purpose, and does not apply to composition. But if the composition is paid the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more."

The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors. True the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act. *Wilmot* v. *Mudge*, 103 U. S. 217. That the restoration of the estate to the bankrupt restores to him his right of action upon choses in action there is no question. *Stone* v. *Jenkins*, 176 Massachusetts, 544.

With this general view of the nature and effect of composition proceedings, we come to a consideration of § 68-a of the Bankruptcy Act, under which it is claimed the set-off was adjudicated in the bankruptcy court by reason of the proceedings we have already set forth. Section 68-a of the Bankruptcy Act of 1898 provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The object of this provision is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the

doctrine of set-off between mutual debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. Black on Bankruptcy, § 544; *In re Kyte*, 182 Fed. Rep. 166. The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity. *Hitchcock* v. *Rollo*, Fed. Cas. 6,535. The section was taken almost literally from § 20 of the act of 1867. In *Sawyer* v. *Hoag*, 17 Wall. 610, in considering that section of the act of 1867, this court said: "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it." While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the generally recognized right of mutual debtors, which has been enacted as part of the Bankruptcy Act, and when relied upon should be enforced by the court. *Bank* v. *Massey*, 192 U. S. 138.

It hence appears that the object of this section was to give the District Court the right to apply the established principles of set-off to mutual credits, when its action was invoked for that purpose.

The language of the act indicates the necessity of action by the court, for the statute provides that "the account shall be stated" and the one debt set off against the other and the balance only allowed to be paid. This statute recognizes the nature of set-off, as established in common law and equitable procedure.

"By the civil law, when there are cross-claims between a plaintiff and defendant which are so connected with each other that the establishment of one can legitimately defeat, reduce, or modify the other, the defendant is always entitled to insist that his own claim shall be liti-

gated with that of the plaintiff; that both shall be disposed of by one sentence; and that the plaintiff's recovery shall be limited to what he shall be entitled to, if anything, as the result of adjusting both claims and striking a balance, if necessary, between them; and he does this by bringing a cross-action (*reconventio*). Mutual debts do not, indeed, properly constitute cross-claims by the civil law, for they extinguish each other *ipso jure*, and the party alone in whose favor the balance is, has a claim which can be enforced by action, and his claim is only to the extent of such balance. Therefore a defendant who, at common law, would have recourse to a statutory set-off, would not, by the civil law, bring a cross-action, but he would plead payment (*compensatio*). Nor is a defendant, who has a genuine cross-claim, bound to assert it by a cross-action; he may assert it by a wholly separate and independent action. How, then, does a cross-action differ from one which is not a cross-action, and which nevertheless is brought by a defendant against a plaintiff? It is conceived that the essential difference is in the judgment. If a defendant wishes to have his own claim and the plaintiff's disposed of by one sentence, in the manner before stated, he brings a cross-action. If he wishes to have his own claim disposed of by a separate sentence, and without any reference to the plaintiff's claim, he brings a separate action. In the latter case he may of course choose his own time for suing, and his own court, and may prosecute his action slowly or speedily, as he sees fit, and without any reference to the plaintiff's action; but in the former case, as he wishes to have his action and the plaintiff's disposed of together, he must comply with the conditions necessary for that purpose." Langdell, Equity Pleading, § 118.

In the present case, the Glass Company made no attempt to invoke the action of the District Court in the bankruptcy proceedings. If it had the right to do so,

it did not seek the action of the bankruptcy court to state the account or make the settlement, and we have been unable to find any case, and none is called to our attention, in which it is held that simply because of the bankruptcy proceedings and the filing of the schedule and proofs of debt the set-off is automatically made between parties holding mutual credits. On the other hand, as the section indicates, and so far as we know, all the authorities hold, this section is not self-executing, but its benefit is to be had upon the action of the District Court, only when it is properly invoked, and that court has the primary duty of determining for itself whether there are "mutual debts or credits" that should be set off one against the other according to the true intent and meaning of the Bankruptcy Act.

We have no means of knowing what the court would have held had it been asked to order a set-off of the bankrupt's claim for damages against the creditor's claim upon a promissory note. (See *Libby* v. *Hopkins*, 104 U. S. 303; *In re Becker Bros.*, 139 Fed. Rep. 366; *Palmer* v. *Day*, 2 Q. B. 618; and the discussion of the subject in *Morgan* v. *Wordell*, 178 Massachusetts, 350.) We need not, therefore, inquire what that court would have done had its action been properly invoked, nor whether the Glass Company could have refused the amount of the composition and applied to the District Court for an order of set-off, nor what would be the right of the Glass Company had it refused to take the composition and undertaken to set off its debt when sued in this case. Indeed, the Glass Company in this suit denied and contested the validity of the plaintiff's claim. Nor need we discuss the right of the Glass Company to set off this claim had it tried to do so in the state court.

The question arose in that way in *Wasey* v. *Whitcomb*, 167 Michigan, 58, in which a suit was brought by the trustee in bankruptcy to recover upon a claim in the

state court. This was also the situation in *Wagner* v. *Burnham*, 224 Pa. St. 586. In the English case of *West* v. *Baker*, 1 Law Reports, Exch. Div. 44, the action was brought by one in whom, under a composition proceeding the court had by order vested the estate, such person having furnished the consideration to carry out the composition, a proceeding authorized by § 81 of the English Bankruptcy Act of 1869. It was held that in such action the effect of the order was to vest the property of the bankrupt in the plaintiff, subject to the right of set-off as to debts which would have been provable in bankruptcy. No such question arises here, as the plea in this case set up former adjudication in the Federal court, and no attempt was made to plead the right of set-off independently of such plea.

There is lacking in this case the first and most essential element of *res judicata*, namely, former judgment of a competent court, adjudicating the matter in controversy between the parties, yet *res judicata* in the bankruptcy court by the former proceedings was the sole contention of Federal right here put in issue.

As already said, it appears in this plea, that the Glass Company took the amount of the composition, twenty per cent. of its full debt, after the composition had been carried by the majority of the creditors, and approved by the court. If, as is now contended, set-off had been automatically worked between these opposing claims, one would substantially have satisfied the other, and the Glass Company would be in no position to claim or receive the dividend that it did receive in the composition. It certainly cannot maintain these inconsistent positions. This point was adjudicated under the former Bankruptcy Act, which for this purpose is substantially the same as the present one, in the case of *Hunt* v. *Holmes*, decided in the District Court of Massachusetts, 16 N. B. Rep. 101; *S. C.*, Fed. Cas. 6890, in which the opinion was by Judge

Lowell, then District Judge. The learned judge ruled that a creditor who took his composition dividend after the composition was finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waived his claim of set-off; there being no evidence that he received the amount under protest or by mistake or under any other circumstance which would entitle him to a re-hearing or readjustment. In *In re Ballance*, 219 Fed. Rep. 537, where a creditor filed a petition to vacate a composition upon the ground of fraud, it was held that the petitioner, after a demurrer to his petition had been overruled, could not take the amount of the composition and also take the chance of proving the allegations of his petition to set aside the composition for fraud, but that he must make election as to which form of relief he would accept, and that he could not take his share of the composition as a partial payment and proceed to recover upon the unpaid balance of his claim.

So, in this case, although the composition was carried, as the plea avers, against the objection of the Glass Company, it made no attempt to have the set-off adjudicated in the bankruptcy court, made no opposition to the confirmation of the composition as was its right if it saw fit to do, and took and holds its proportion of the composition offered, in the same manner as other creditors.

As the only Federal question is presented because of the alleged *res judicata* in the District Court, and for the reasons stated that plea was not good, it follows that there is no error of a Federal nature in the judgment of the Court of Maryland, and the same is

Affirmed.

MR. CHIEF JUSTICE WHITE, with whom concurred MR. JUSTICE HUGHES, MR. JUSTICE LAMAR and MR. JUSTICE MCREYNOLDS, dissenting.

I am unable to conclude that the plaintiff in error, the

Glass Company, was not secured the right by the Bankrupt Law of the United States to set off a claim held by it against the claim which was sued on by De Witt, the defendant in error, who was plaintiff below. These are the undisputed facts: De Witt, a jobber in glass, thinking that the Glass Company for the purpose of making the profit itself, had wrongfully induced a person with whom he had a contract for the sale of a lot of glass bottles not to comply with the sale, thereby causing him a loss of a profit of $800, determined not to pay the Glass Company for merchandise which he had bought from it or to buy from it merchandise and not pay for it in order thus to be in a position to set off his claim in damages against the purchase price and thereby make himself whole. De Witt was declared an involuntary bankrupt. The Glass Company was stated in the schedules as a creditor on a note for $790.03 which it is established was the purchase price of merchandise bought from the company. There was scheduled as an asset of the bankrupt estate an unliquidated claim against the Glass Company for damages, commissions and breach of contract stated as amounting to $940. De Witt proposed a composition of twenty cents on the dollar which was sanctioned by the requisite vote of creditors, the Glass Company voting in the negative, and the composition, after being approved by the court, was carried out. In doing so De Witt without liquidating the surrendered claim against the Glass Company for damages or attempting to have it set off against the claim of that company, paid the twenty per cent. upon the face value of the claim. Thereupon deeming that by the composition he had been reinvested with full ownership of the claim for damages, De Witt brought this suit against the Glass Company to liquidate and enforce the same. The suit originally included an alleged sum for commissions, etc., but the demand was reduced before judgment to the asserted right to liquidate and recover the damages

alleged to have been occasioned by the cause previously stated. And it is to the judgment of the court below allowing the amount of damages claimed against the company without any deduction whatever for the contract price of the goods admitted to be due in the bankruptcy proceedings that this writ of error is prosecuted.

I am admonished that it may be that my view is obscured by what seems to me the wrongful result which the judgment below accomplishes, that is, allowing De Witt as a result of the bankruptcy to hold on to and enforce as against the Glass Company his surrendered claim for damages while at the same time treating the bankruptcy as having relieved him of the duty of paying for the goods bought; that is to say, not confining him to doing that which he contemplated when he refused to pay for the goods, to set off his alleged claim for damages against the price, but permitting him to obtain the goods of the company practically without paying for them and at the same time to recover the full amount of his damage claim.

The views which control my judgment in the case are covered by two general propositions which I state separately.

(a) *Did the bankrupt law confer upon the Glass Company the right to have the scheduled claim against it for damages when liquidated set off against the debt which it proved for the price of the goods by it sold?* That the comprehensive provisions of §§ 68*a* and *b* of the bankrupt law relating to set-offs and counter claims are coincident with the scope of the act and therefore give the power to the bankruptcy court to determine whether or not the right of set-off exists as between all and any claims required to be surrendered as assets of the estate on the one hand and all debts proved against the estate on the other is, I submit, self-evident, for to hold to the contrary would deprive the bankruptcy court of authority to exert its powers over matters to which its jurisdiction in the nature of things

must extend. It is equally indisputable, as long since settled by this court, that in exerting its powers when occasion requires it as between all or any of the items of the active or passive side of the bankrupt estate it is the duty of the court of bankruptcy not merely to determine the right of set-off by strict common law principles, but to govern the subject by the broad doctrines of set-off as administered by courts of equity. *Sawyer* v. *Hoag*, 17 Wall. 610. It is also clear that in order to additionally accomplish the public purposes just stated the bankrupt act in some respects narrows the operation of set-off since it prevents it from automatically operating by subjecting it in every case to judicial control. Under these principles there is no reason for doubting that the proved claim of the Glass Company against the bankrupt estate was subject under the law to be set off against the scheduled claim held by the estate against the Glass Company whenever the latter claim was so liquidated as to enable the set-off to be made and that the duty of accomplishing this essential result by the terms of the statute primarily rested upon the bankruptcy court. I say the terms of the statute since it in express words commands that the set-off for which it provides shall be accomplished to the end that a distribution shall be made not upon the original claims, but upon the balances resulting from carrying out the commands of the statute as to set-off. This being true, the question at once arises:

(b) *Was the effect of the composition to prevent the set-off or to relieve the duty concerning it expressly commanded by the statute?*

The only theory upon which this question can be answered in the affirmative must be the conception that a composition completely terminates bankruptcy and that therefore whatever rights or duties arose from the bankrupt law which were not fully executed when the composition took place passed out of existence and therefore the

rights granted by the composition have no ancestral relation to the prior bankruptcy proceedings. But to say this is to misconceive the nature of composition proceedings which, as this court has long since pointed out, are but a part of bankruptcy and a means not for destroying the express command of the bankrupt law, but for giving effect to its provisions and rendering them more efficacious for accomplishing the just ends which they have in view. *Wilmot* v. *Mudge*, 103 U. S. 217. This being true, what is the situation? The bankrupt estate had a scheduled claim against the Glass Company which was unliquidated and the Glass Company had a proved claim against the estate which was liquidated. The bankrupt proposed by composition to have the assets turned over to him on paying a percentage on the claims due by the estate. By the very terms of the bankrupt act the duty was to set off the one against the other so that only the balance between them would be due on the one side or the other. But as the claim held by the estate was unliquidated and this could not be done without liquidation, it follows either that the acceptance of the composition and turning over the estate without liquidation was an abandonment of the unliquidated claim or that it was transferred to the bankrupt subject to the duty to set off whenever as a result of a liquidation following the composition the condition arose which made it possible to obey the express command of the statute. One or the other of these conclusions, I submit, is absolutely required by the plain terms of the statute unless it is to be recognized that the bankrupt law provides that a bankrupt may discharge himself by bankruptcy from all that he owes one of his creditors and yet by operation of that statute retain and after the bankruptcy enforce in his own right all the claims he had against such creditor. But the subject does not depend for its solution upon original reasoning since it is well demonstrated by authority.

Certain is it that the provisions as to composition which were first enacted by Congress in 1874, (§ 17, ch. 390, 18 Stat. 178, 182) as an amendment to the existing bankruptcy act, were in substance taken from the English bankrupt act of 1869. *In re Scott*, Fed. Cas. No. 12,519.

In *West* v. *Baker*, 1 Ex. D. 44, the facts were these: West was adjudicated a bankrupt and a composition was accepted by his creditors and the bankruptcy was annulled. Under a provision of the bankrupt act on the approval of the composition the property was turned over to a trustee, presumably for his security as he had advanced the sum necessary to enable the bankrupt to pay to his creditors the amount offered in composition. This trustee then in the name of the bankrupt sued one Baker to recover an amount claimed to be due from Baker for work and labor done for him by West before the bankruptcy. By way of defense it was pleaded that before the adjudication in bankruptcy West was indebted to Baker for debts and damages which were provable in bankruptcy against the bankrupt estate and which could have been set off in bankruptcy against the claim of West and therefore the defendant, Baker, was entitled as a defense to the suit to set off his claim against the one which the trustee in the name of West sought in the suit to enforce. A demurrer to the plea was overruled, the views of the court being stated as follows:

"Kelly, C. B. . . . The whole estate of the bankrupt was undisposed of; and the Court has power under the 81st section, in the case of an adjudication being annulled, to order that the property of the debtor shall vest in such person as the Court may appoint, or, in default of such appointment, revert to the bankrupt. This latter has not been done; but the court has transferred the whole estate of the bankrupt to the plaintiff, no doubt in consideration of the plaintiff having guaranteed a dividend of 7s. 6d. in the pound. Does this transfer

entitle the plaintiff to recover debts freed from the right of the debtor to set off such claims as the present? I think not; because in bankruptcy the debtor could have set off this very claim; and if the Court has transferred to the plaintiff all the authority itself had, that was to sue the defendant subject to the right to set off not only any specific sum, but any claim to unliquidated damages provable under bankruptcy. If this were otherwise, much injustice would be done. I apprehend the substance of the clauses of the Act is, that what passed to the plaintiff was a right to receive debts, but subject to the right to set off counter claims whether of specific sums or of unliquidated damages provable in bankruptcy.

"Cleasby, B. . . . The question is, whether the effect of the 28th section was to alter the status of the defendant because of the substitution of a scheme of settlement for the bankruptcy. On looking at the section the effect appears to be that, instead of the trustee dealing with the estate, the creditors shall be at liberty to accept a composition. This, though accompanied by the annulling of the bankruptcy, does not take the matter out of the Bankruptcy Court, so as to prevent the general rules of bankruptcy applying, or alter the position of the parties except so far as it may be altered by the agreement they have come to to take the composition instead of the estate. By § 28 the provisions of a composition or general scheme made in pursuance of the Act may be enforced by the Court in a summary manner, and are to be binding on all the creditors so far as relates to any debts due to them and provable under the Bankruptcy Act. That clearly shows that the Bankruptcy Court still retains the scheme under its control, and therefore it is subject to the ordinary rules of that court as to set-off."

In *Ex parte Howard National Bank*, 2 Lowell, 487, *S. C.*, Fed. Cas. No. 6764, without going into detail, the case was this: There was a bankruptcy and a composition.

After the composition the bankrupt sought to enforce a claim which had passed to him in virtue of the composition and was confronted with an alleged right to set off as against such claim on his part, a claim against him which had been in the bankruptcy a claim against the estate. The court under these conditions in upholding the right to set-off directed attention to the provisions of the bankrupt law on the subject and to its command that only the balance should be paid and the inherent relation which that requirement of the act created between the claims scheduled in the bankruptcy on the one hand and proved on the other and the character which was affixed to them for the purpose of set-off even after a composition had been ordered. The court said:

"I have treated this as a case between an assignee and a creditor, because the bankrupt in a composition case stands, as to set-off, in the position of an assignee, if none has been appointed." In other words, treating the allowance of the composition as having, so to speak, irrevocably stereotyped the rights of the parties in conformity with the bankrupt law and to the end that its purposes might be carried out, the bankrupt holding under the composition was treated for such purposes as but an assignee in bankruptcy and therefore so far as set-off was concerned as having no greater right under the composition than existed in the bankruptcy in favor of the estate at the time the composition was made.

These cases as well as the principles upon which they rest clearly make manifest the fact that it was not only within the power but it was the duty of the court below as an inevitable result of the liquidation of the claim against the Glass Company which it made to treat the set-off as accomplished since that result was necessary to give vitality to the order of composition and to secure the right of set-off which inhered in the nature of the title given by the bankruptcy court to the bankrupt as the

result of the composition. From this conclusion it necessarily follows that the duty to enforce the set-off integrally inhered in the order and judgment which sanctioned the composition since otherwise the order would have embodied within itself a refusal to obey and give effect to the express command of the bankrupt law as to the nature and character of what could be transferred under the composition. And this consequence is obvious when it is borne in mind that the result of the composition was to recognize and fix the right of set-off although not denying the power to liquidate as a means of carrying out the established right of set-off. This being true, it is also true that the moment the court below liquidated the claim, in and by virtue of the order of composition the duty arose to give effect to the right of set-off established by the order of composition in conformity with the express command of the bankrupt law. And this fully answers the suggestion that as the right to the set-off was not asserted *eo nomine* but the decree in composition was pleaded as *res judicata*, therefore there was no denial of the right of set-off even if secured as the result of the composition. Certainly it must be that the plea of the decree in composition as *res judicata* was a plea advancing the right which that decree necessarily secured.

This in my judgment leaves it necessary only to consider the assertion that even although the right was secured by the bankrupt law and even although that right was preserved by the composition and inhered in the very nature of the title which the composition passed, it nevertheless does not here exist because of what was done at the time the composition was adopted. This rests upon the theory that as the Glass Company took the dividend upon its claim and did not insist upon a liquidation of the claim in damages held by the bankrupt estate, it therefore waived any right to future set-off concerning said claim. I must confess I find difficulty

in precisely grasping the proposition. The Glass Company disputed the claim in damages and the duty of liquidation was on the bankrupt or the bankrupt estate but not on the Glass Company, and if waiver or estoppel was the result of what was done, the waiver was not as to the right of the Glass Company, but as to the claim for damages and against the estate which held it. Indeed, the tender to the Glass Company of the full percentage due on its claim without liquidating the claim for damages against it so as to accomplish a set-off, if waiver is to control, was a waiver by the bankrupt of a right to liquidate and assert his claim in the future. The proposition otherwise stated is this: If the composition is to be considered as having irrevocably excluded the right to set-off, then of course the consequences of the failure to ask for it must fall upon the one holding the unliquidated claim and not be cast upon the one who had no duty or concern with that subject until the liquidation was accomplished, especially in view of the payment made of the percentage upon the amount proved, a payment which was only consistent with the theory that the unliquidated claim was abandoned. If on the other hand it be considered in consonance with the principles and authorities to which I have referred that the composition did not terminate the bankruptcy but that a liquidation for the purpose of set-off could thereafter be accomplished, then it clearly follows that the effect of the bankruptcy and of the judgment of composition was to fix and secure that right and it cannot be held consistently with the statute that the composition proceedings taken conformably with the statute were a waiver of the right which those proceedings inevitably secured and made effective.

For these reasons I dissent, and am authorized to say that Mr. Justice Hughes, Mr. Justice Lamar, and Mr. Justice McReynolds concur in this dissent.